Supreme Court, U.S.
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No. 05- 05-399

IN THE

Supreme Court of the United States

HARRY EDELSON,

Petitioner,

v.

CDC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Seventh Circuit err in rejecting the position of Petitioner Harry Edelson and the Securities and Exchange Commission (as *amicus curiae*), supported by the decisions of all other Circuit Courts of Appeal that considered the issue, that stockholders have a private right of action under § 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d)) to sue for misrepresentations and inaccurate disclosures, under circumstances that do not involve either a tender offer or other stock accumulation that could affect corporate control?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the Seventh Circuit Court of Appeals are the following:

Petitioner, Harry Edelson, an individual,

and

Respondent, CDC Corporation, formerly known as chinadotcom corporation, a Cayman Islands corporation with its principal place of business in Hong Kong.

In addition, the following persons were defendants in the District Court:

Raymond K.F. Ch'ien, an individual who is a citizen of Hong Kong;

Peter Yip Hak Yung, an individual who is a citizen of Hong Kong; and

Asia Pacific Online Ltd., a Cayman Islands corporation owned by the wife of Peter Yip Hak Yung and a trust for the benefit of his children.

All defendants other than CDC were dismissed from the case in the District Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Harry Edelson respectfully prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit was filed on April 25, 2005, and is reported at 405 F.3d 620 (7th Cir. 2005). That opinion is attached as Appendix A hereto. The unreported opinion of the District Court, dated January 28, 2004, is attached as Appendix B.

STATEMENT OF JURISDICTION

Edelson's request for Rehearing and Suggestion of Rehearing En Banc was denied by the Seventh Circuit in an Order entered June 27, 2005. Appendix C at 50a-51a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent federal statute — § 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d)), and the principal Securities and Exchange Commission ("SEC") regulations promulgated thereunder, are reproduced in Appendix D.

STATEMENT OF THE CASE

I. The District Court Proceedings

A. Edelson's § 13(d) Allegations

Edelson is a former director of defendant CDC Corporation ("CDC", formerly known as "chinadotcom corporation"). At all relevant times, Edelson was also a CDC stockholder.

Edelson brought this action seeking injunctive relief and damages arising from his ouster from the CDC Board. Edelson alleged that the directors' election at CDC's 2003 Annual General Meeting ("AGM"), which resulted in the loss of Edelson's Board seat, was illegal due to a violation of § 13(d) of the Securities Exchange Act of 1934 ("Exchange Act"; 15 U.S.C. § 78m(d)), and implementing SEC regulations promulgated thereunder. Section 13(d) is a disclosure statute, under which any person who beneficially owns more than 5% of any class of the issued and outstanding stock of a company listed on a national securities exchange must file disclosure statements in the form mandated by applicable SEC rules. CDC stock is traded on the NASDAQ market, and trades millions of shares each week.

As explained below, Edelson was illegally removed from CDC's Board as a result of the failure of Peter Yip Hak Yung ("Yip", CDC's CEO at that time) and Raymond K.F. Ch'ien ("Ch'ien", CDC's Executive Chairman) to disclose their intent to seek Edelson's removal from the CDC Board. That disclosure was required by § 13(d).

Edelson and J. Carter Beese ("Beese"), a former SEC commissioner, were CDC's only U.S. based directors, and were two of the three members of CDC's audit committee. Conflicts ensued between Edelson and Beese, on the one hand, and CDC management, on the other, pertaining to numerous corporate governance issues at CDC.

Among other things, Edelson and Beese challenged the propriety of management's suggestion that CDC expand a program of buying back stock from its shareholders. That suggestion was made shortly after Yip and Ch'ien had personally acquired a substantial block (approximately 4%) of CDC shares

in a private transaction.[1] On the heels of this purchase, Yip forcefully advocated that CDC buy back CDC shares from stockholders at a price above that which he and Ch'ien had only just recently paid for their shares.

Edelson and Yip clashed over numerous other issues. On April 16, 2003, Edelson sent an e-mail to Ch'ien and CDC other non-management directors in which he bluntly stated that "Corporate governance at chinadotcom [CDC] . . . is falling to pieces . . .". Edelson's e-mail was highly critical of Yip.

Edelson's and Beese's terms as directors were due to expire at CDC's 2003 AGM. Edelson alleged that Yip and Ch'ien formed and implemented a clandestine plot to remove Edelson and Beese from the Board, using the voting power of Yip's APOL shares. Edelson has learned that an official of the Chinese government (upon which CDC is dependent with respect to its ability to obtain access to the Chinese market) directed CDC to remove the U.S. directors, Edelson and Beese.

Because APOL (Yip's family company) beneficially owned approximately 19% of CDC's stock, APOL was therefore subject to the § 13(d) disclosure requirements. Yip, through APOL, made two Schedule 13G filings with the SEC, in which Yip and APOL expressly represented that the CDC stock was not acquired and was not being held with the purpose or effect of changing or influencing control over CDC.[2] However, Yip and Ch'ien did

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1. Yip's acquisition was effected through defendant Asia Pacific Online Ltd. ("APOL"), a corporation owned by Yip's wife and a trust for their children.

2. Schedule 13G is a short-form disclosure document that may be filed by persons who do not seek to change control over an issuer. (Cont'd)

not publicly disclose that they planned to remove Edelson and Beese from the Board. Specifically, Yip never caused APOL to file a Schedule 13D disclosing APOL's opposition to Edelson's and Beese's reelection.

To the contrary, Yip and Ch'ien purported to concur in the recommendation by the CDC Board to its stockholders, contained in the Notice of the 2003 AGM, that the stockholders reelect all incumbent directors (including Edelson and Beese). Faced with a seemingly routine, uncontested annual meeting at which existing directors were presumably to be reelected in conformity with the Board's recommendation, only 48.25% of the issued and outstanding CDC stock was represented in person or proxy at the meeting. Consequently, Yip's APOL shares alone comprised more than 35% of the stock voted at the meeting, and accounted for nearly 60% of the shares voted against Edelson. On the strength of Yip's and Ch'ien's vote against them, Edelson and Beese were not re-elected, and CDC later replaced them on the CDC Board.

Edelson alleged that under SEC Rule 13d-1(e) (App. D at 58a-59a), Yip's APOL stock was disqualified from voting at the 2003 AGM. That rule precludes a Schedule 13G filer who has formulated a plan or proposal for a change of control from voting that person's stock until 10 days following the filing of a Schedule 13D disclosing the control intent. No Schedule 13D was ever filed by Yip or APOL prior to CDC's 2003 AGM. Nevertheless, CDC improperly counted APOL's votes in determining the results of the directors' election, and therefore

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(Cont'd)

See § 13(d)(5) (App. D at 55a) and SEC Rule 13d-1(c) (App. D at 57a-58a). If a person who has filed Schedule 13G formulates a control intent, that person must then file Schedule 13D, a more comprehensive disclosure document. SEC Rule 13d-1(e)(1) (App. D at 58a).

declared that Edelson's and Beese's bid for reelection had been defeated.

In essence, Edelson alleged the failure of Yip, through APOL, to make the required disclosure of his intent to change control over CDC kept Edelson and all stockholders in the dark. As a result, Yip and Ch'ien were able to orchestrate the removal of Edelson and Beese from the Board. Yip's and Ch'ien's failure to disclose their control intent frustrated both corporate democracy and the underlying purposes of § 13(d).

B. The Motions In The District Court, And The District Court Decision

Shortly after the filing of the original complaint, Edelson filed a Motion for Preliminary Injunction. Edelson sought an order: (a) providing Edelson with an opportunity to solicit proxies for a new stockholders' meeting; (b) precluding CDC from calling a stockholders' meeting on short notice; and (c) requiring CDC to provide Edelson with materials he needed to mount a campaign.

CDC, the only defendant that Edelson was then able to serve, opposed Edelson's Motion for Preliminary Injunction on the basis that as a former CDC director, Edelson lacked standing to sue under § 13(d). Edelson responded by (*inter alia*) contending that he had standing as a CDC stockholder, in view of the long-standing recognition by numerous courts that stockholders have a private right of action to seek injunctive relief for violations of § 13(d).

While the Motion for Preliminary Injunction was pending, CDC filed a Motion to Dismiss Edelson's original complaint, contending that Edelson lacked any legally sufficient claim under § 13(d). Edelson responded to CDC's Motion to Dismiss by seeking leave to file an Amended Complaint. CDC opposed

Edelson's Motion for Leave to Amend on the basis that Edelson's amendment would be futile, again challenging Edelson's standing to sue under § 13(d).

On January 28, 2004, the District Court entered its Memorandum Opinion and Order (App. B hereto), in which the District Court ruled on both Edelson's Motion for Preliminary Injunction, and his Motion for Leave to Amend. The District Court denied the Motion for Preliminary Injunction on the sole basis that Edelson could not establish a likelihood of success on the ultimate merits of his § 13(d) claim. The District Court concluded that "Section 13(d) does not grant a private right of action in this case" in view of Edelson's status as a former CDC director. App. B at 38a; see also App. B at 40a-43a. The District Court also rejected Edelson's contention that he had standing to sue as a CDC stockholder. App. B at 43a-44a. In addition to denying Edelson's Motion for Preliminary Injunction, the District Court dismissed the § 13(d) claim in Edelson's initial Complaint and denied Edelson leave to file an amended complaint containing any § 13(d) claim.

Because the District Court's January 28, 2004 Order denied Edelson's request for an injunction, Edelson timely appealed to the Seventh Circuit pursuant to 28 U.S.C. § 1292(a)(1).

II. The Seventh Circuit Proceedings

Following briefing and oral argument on Edelson's appeal, the Seventh Circuit entered an order inviting the SEC to file an *amicus curiae* brief. The SEC's *amicus curiae* brief was filed on December 17, 2004.

The SEC squarely supported Edelson's position that he had standing to sue under § 13(d), and that § 13(d) provided a private right of action even in the absence of a tender offer or a control contest. Significantly, the SEC declined to address in detail

matters that it considered to be beyond its substantive expertise (SEC *amicus* brief at 19). With respect to the District Court's conclusion that Edelson lacked standing because § 13(d) was not intended to provide relief for ex-directors, the SEC stated that:

> . . . Edelson, in his capacity as a shareholder, was illegally kept in the dark about the change in control plans of [management] shareholders who were required to disclose those plans under Section 13(d). The solidifying of management's hold over a company, to the exclusion of dissenting voices, is the kind of event that Section 13(d)'s disclosure requirement was intended to reveal to shareholders, . . . and Schedule 13D expressly requires the disclosure of any plan to change the composition of corporate boards. *See* Schedule 13D, Item 4.

SEC *amicus* brief at 22-23.

The SEC was blunt in addressing CDC's contention that § 13(d) gives rise to a private right of action only in the event of a tender offer or control contest, stating:

> While the increase in cash tender offers was the genesis of the Williams Act, *defendant's assertion that Section 13(d) only applies to tender offers or contests for control of the issuer is nonsense*. The Williams Act's coverage is very broad. The statute itself is broadly written and contains no restriction of its coverage to accumulations of stock made as part of a tender offer. Under Section 13(d)(1) "[a]ny person" who, after acquiring a class of securities registered under Section 12, "is directly or in directly the beneficial owner of more than 5 per centum of such class shall" make certain disclosures.

SEC *amicus* brief at 27, emphasis added. Relying on a leading securities law treatise, the SEC concluded that, "Thus, '[t]he disclosures required of "any person" by § 13(d) . . . apply regardless of whether a tender offer or any other effort to change or influence control is contemplated or pursued.'" SEC *amicus* brief at 28, quoting V Loss & Seligman, *Securities Regulation* 2176.

On April 25, 2005, the Seventh Circuit panel filed its opinion, affirming the District Court's dismissal of Edelson's § 13(d) claim. However, the Seventh Circuit did not adopt the District Court's rationale that Edelson lacked standing to sue under § 13(d). 405 F.3d at 625, App. A at 9a. Instead, the Seventh Circuit held that stockholders have a private right of action under § 13(d) only in circumstances involving "a tender offer or accumulation of stock for the purpose of controlling the issuer". 405 F.3d at 632, App. A at 25a; see also 405 F.3d at 634, App. A at 29a.[3] In so holding, the Seventh Circuit explicitly rejected the SEC's position that the private right of action under § 13(d) should not be so limited. 405 F.3d at 631-634, App. A at 24a-29a.

Edelson timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc on May 9, 2005. In that Petition, Edelson argued that Yip's and Ch'ien's acquisition of 4.5 million additional CDC shares in early 2003 was an "accumulation of stock for the purpose of controlling the issuer", so Edelson's § 13(d) claim was actionable even under the reasoning employed in the Seventh Circuit's opinion. The Seventh Circuit denied rehearing in a June 27, 2005 Order. Appendix C hereto.

3. The Seventh Circuit's reference to "accumulation and aggregation" of stock is confusing. Every §13(d) claim necessarily involves an "accumulation or aggregation of stock" or other securities amounting to more than 5% of a class; otherwise, §13(d)'s reporting requirements would not be applicable at all.

SUMMARY OF ARGUMENT

A serious and egregious mistake has been made. For at least the last 34 years, the various federal Circuit Courts of Appeal have recognized the right of stockholders of publicly-held corporations to seek equitable relief to redress violations of § 13(d). In this case, the Seventh Circuit grafted new restrictions upon stockholders' rights to sue under § 13(d), constricting that right only to situations involving tender offers or accumulations of stock for the purpose of effecting a change in control.

Under the Seventh Circuit's decision, a corporate insider can file with impunity disclosure statements containing false and misleading representations concerning the insider's control intent, secure in the knowledge that, unless and until a tender offer is made or some other control contest ensues, the insider is immunized from stockholder suits under § 13(d). Even though an insider's erroneous statements concerning its control intentions are likely to affect stockholders' and the marketplace's perception of the issuer — perceptions which will then be reflected in the stock price — the Seventh Circuit's decision forbids a stockholder (again, up to the time a tender offer is made or a control contest arises) from seeking truthful and accurate disclosure.

The limits placed by the Seventh Circuit's decision on the § 13(d) right of action conflict with the decisions of all of the other Circuits, none of which has imposed similar limitations on the ability of stockholders (or others) to sue under § 13(d). To the contrary, other Circuits have upheld § 13(d) claims in situations that did not involve tender offers or other accumulations of stock for the purpose of effecting a change in control.

The SEC effectively recognized as much in its *amicus* brief. Nevertheless, the Seventh Circuit rejected the SEC's position. In doing so, the Seventh Circuit improperly departed from the fundamental principle that the viewpoint of an expert administrative agency is to be given deference — not disregarded and disrespected, as is the case here.

The limitations imposed by the Seventh Circuit on the § 13(d) right of action are unwarranted, are contrary to the language, purpose and legislative history of § 13(d), and destroy the uniformity that had previously existed among the Circuits with respect to the right of stockholders to sue under § 13(d).

In addition, this Court has held that when Congress amends a statute under which a private right of action has been implied, and does not eliminate or limit that right of action, Congress is deemed to have approved private enforcement of that statute. The implied private right of action under § 13(d) has persisted for more than three decades even though Congress has, during that period, amended § 13(d) and has given substantial attention to private remedies under the federal securities laws. The Seventh Circuit's unilateral creation of new and previously unknown limitations on the implied private right of action under § 13(d) is therefore contrary to this Court's prior decisions.

Moreover, the Seventh Circuit has adopted a vague and nebulous standard as the line of demarcation as to when stockholders can sue under § 13(d). The pragmatic difficulties in applying the Seventh Circuit's new limitations on § 13(d) actions is aptly demonstrated by the erroneous result reached in this case. Here, Edelson's claim arises from a situation that undoubtedly involves an "accumulation of stock for the purpose of effecting a change in control" — Yip and Ch'ien: (a) bought 4% of CDC's outstanding shares just months before the 2003 AGM, which increased Yip's stake (through APOL) to almost

19%; and (b) used those shares to oust Edelson and Beese from the CDC Board. Even under the Seventh Circuit's newly-created rule, Edelson had a viable § 13(d) claim. Nevertheless, the Seventh Circuit barred Edelson's claim. This Court should therefore grant certiorari to re-establish, in conformity with the decisions of all other Circuits, that stockholders have standing to sue under § 13(d) without regard to the artificial and unworkable limitations imposed by the Seventh Circuit's decision.

The Seventh Circuit's decision also concerns an issue of exceptional importance. It restricts the rights of millions of stockholders of thousands of publicly-held companies. Under the Seventh Circuit's decision, those stockholders no longer have the right to compel the owners of substantial blocks of stock to make Congressionally-mandated honest disclosures unless or until a control contest is already in full swing (which frequently is very difficult to decipher). According to the Seventh Circuit, stockholders are without redress even where, as here, the absence of required truthful disclosures enables a § 13(d) filer to change control by ousting independent directors, without the shareholders ever even knowing that an effort to change control is underfoot.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT DECISION CREATES A CONFLICT AMONG THE CIRCUITS.

The Seventh Circuit decision in this case is contrary to decisions of the First, Second, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits, all of which have held that a private right of action should be implied under § 13(d). *See GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971); *General Aircraft Corp. v. Lampert*, 556 F.2d 90, 97 (1st Cir. 1977); *Dan River, Inc. v.*

Unitex Limited, 624 F.2d 1216, 1224 (4th Cir. 1980); *Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 714 (5th Cir. 1984); *Chromalloy American Corp. v. Sun Chemical Corp.*, 611 F.2d 240 (8th Cir. 1979); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1158 (9th Cir. 1992); *Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513 (11th Cir. 1985).[4] None of these cases purported to limit private actions under § 13(d) only to situations involving a tender offer or an accumulation of stock in an effort to gain control of a publicly-held company.

To the contrary, in *GAF Corp. v. Milstein, supra*, the Second Circuit reinstated a § 13(d) claim, even though plaintiff-issuer had already successfully rebuffed a proxy contest instituted by defendants.[5] There was no indication of any ongoing effort to

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4. District Courts in the Third, Sixth and Tenth Circuits have also upheld the existence of a private right of action under § 13(d). *See Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1059-1060 (D.Del. 1983); *Diceon Electronics, Inc. v. Calvary Partners, L.P.*, 772 F. Supp. 859, 863-864 (D.Del. 1991); *Homac Incorporated v. DSA Financial Corp.*, 661 F. Supp. 776, 792-793 (E.D.Mich. 1987); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, 574 F. Supp. 1172, 1189-1193 (S.D.Ohio 1982); *Kirsch v. Bliss and Laughlin Industries, Inc.*, 495 F. Supp. 488, 491-492 (W.D.Mich. 1980); *K-N Energy Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 763-764 (D.Colo. 1983).

5. *GAF* and many of the other decisions cited herein involve § 13(d) claims brought by issuers. Issuers have standing to sue under § 13(d) as the stockholders' representative. *Indiana National Corp. v. Rich*, 712 F.2d 1120, 1185 (7th Cir. 1983); *Chevron Corp. v. Pennzoil Co., supra*, 974 F.2d at 1158. Obviously, if an issuer has standing to sue as the shareholders' representative, then shareholders, like Edelson, also have standing under §13(d). *GAF Corp. v. Milstein, supra*, 453 F.2d at 719, n. 21 ("Clearly, a shareholder has standing", citing *Grow Chemical Corp. v. Uran*, 316 F.Supp. 891 (S.D.N.Y. 1970)); *Jacobs v. Pabst Brewing Co., supra*, 549 F.Supp. at 1054-1055 (expressly upholding shareholder standing under § 13(d)).

seize control after the proxy contest ended. The Second Circuit allowed the § 13(d) claim to proceed in order to rectify the prior dishonest and misleading disclosure.

In *Chevron Corp. v. Pennzoil Co.*, *supra*, defendant filed a Schedule 13D stating that it acquired stock in the issuer to gain a tax advantage, with no intent to obtain control. The Ninth Circuit reversed the entry of summary judgment for defendant because the truthfulness of this statement was a triable issue of material fact. The *Chevron* Court allowed plaintiff's § 13(d) claim to proceed even though defendant made no effort to obtain control over plaintiff.

Similarly, in *Dan River, Inc. v. Unitex*, *supra*, defendants' Schedule 13D stated that they acquired the issuer's stock as an equity investment with no present intent to seek control. The Fourth Circuit noted that the circumstances of defendants' acquisiton of the stock undercut the veracity of defendants' statements. It held plaintiff-issuer had standing to seek an injunction requiring accurate disclosure of defendants' intentions.[6] Again, contrary to the Seventh Circuit's decision here, the *Dan River* Court allowed a § 13(d) action to be maintained in the absence of a tender offer or control contest.

Indiana National Corp. v. Rich, *supra* also involved no existing or imminent contest for control. The opinion in that

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6. As noted in *K-N Energy, Inc. v. Gulf Interstate Co.*, *supra*, § 13(d): (a) requires disclosure of "the purpose behind the acquisition of the stock even if there is no present plan to implement that purpose or if such a plan is less than definite" (607 F.Supp. at 767, citing *Dan River, Inc. v. Unitex Limited*, *supra*, 624 F.2d at 1225-1226, and *Chromalloy American Corp. v. Sun Chemical Corp.*, *supra*, 611 F.2d at 247); and (b) "requires the filing party to reveal any purpose tending toward obtaining control of the issuer" (607 F.Supp. at 768). In *K-N Energy*, plaintiff's § 13(d) claim was allowed to proceed prior to any control contest.

case reflects only that plaintiff alleged the defendant-appellees failed to truthfully disclose their "*intention* to acquire control" (712 F.2d at 1181, emphasis added). There was no indication defendants actually had such intent, nor does the opinion reflect that defendants had taken any steps in an effort to obtain control. By reversing the dismissal, the *Indiana National* Court effectively sustained the legal sufficiency of plaintiff's § 13(d) claim notwithstanding the absence of allegations regarding a tender offer or a control contest.

GAF, Chevron, Dan River and *Indiana National* illustrate that the Seventh Circuit decision in this case is a dramatic departure from prior precedent, in that it imposes previously unknown limitations on § 13(d) actions. The Seventh Circuit decision creates a conflict among the Circuits.

In short, as matters now stand, a stockholder or issuer in Indiana, Wisconsin or Illinois who seeks redress for a § 13(d) violation must either: (a) plead and prove facts (the existence of a tender offer or other accumulation or aggregation of stock that could affect corporate control) that need not be alleged by his or her fellow stockholders in the other 47 states; or (b) bring the claim in a district court outside of the Seventh Circuit, assuming that venue is available in such a district. The dichotomy created by the Seventh Circuit decision is unfair to stockholders who live in that Circuit, and creates an open invitation to blatant forum-shopping.[7]

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7. As noted by the decisions cited above, courts have allowed issuers to sue under § 13(d) as the representatives of their stockholders. Accordingly, by restricting the ability of stockholders to sue under § 13(d), the Seventh Circuit's decision necessarily impairs the heretofore recognized standing of issuers to sue on the stockholders' behalf.

II. The Seventh Circuit Improperly Rejected The SEC's Expert Views.

Not only does the Seventh Circuit decision create a conflict among the Circuits, it also callously disregards the expert views of the SEC as *amicus curiae*. The Seventh Circuit's wholesale rejection of the SEC's position is particularly surprising in view of its solicitation of the SEC's views *after* consideration of the parties' briefs and *after* oral argument had been held.

In its *amicus* brief, the SEC stated — loud and clear — that Edelson had a viable claim under § 13(d). As noted above, the SEC branded as utter "nonsense" CDC's argument, which was ultimately accepted by the Seventh Circuit, that § 13(d) applies only in the context of tender offers. SEC *amicus* brief at 27.

In at least one respect, the SEC's *amicus* brief went further than did Edelson. While Edelson argued that Yip should have caused APOL to file a Schedule 13D once he formulated an intent to oust Edelson and Beese from the CDC Board, the SEC argued that Yip should not have filed a Schedule 13G in the first place, stating:

> Presumptively, . . . Yip was not entitled to file a Schedule 13G on behalf of APOL, in his capacity as the beneficial owner of APOL's Chinadotcom shares, because Yip was the CEO of Chinadotcom. ***As the CEO of the issuer it would have been difficult, if not impossible,*** for Yip to certify, as he did, that his beneficial ownership of a large block of shares of the issuer was "not held for the purpose of or *with the effect* of changing or *influencing the control* of the issuer of the securities and were not acquired and are not held in connection with or a participant in any transaction having that purpose.

Id., (italics in the original; bold added).

It is well-settled that considerable weight should be given to an agency's construction of a statutory scheme that it has been entrusted to administer. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 106-107 (1979); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981). The SEC's view that Edelson's right of action was not confined to tender offers or control contests is entitled to great deference. The Seventh Circuit's rejection of the SEC's views is a consideration that warrants the issuance of a writ of certiorari in this case.

III. The Seventh Circuit's Limitations On The § 13(d) Private Right Of Action Are Unwarranted In View Of The Statute's Legislative History.

In grafting new restrictions on to the recognized private right of action under § 13(d), the Seventh Circuit purported to rely on ostensible Congressional intent. It is now well-established that the intent of Congress either to allow or disallow private litigants to sue is the principal factor to be considered in determining the existence of an implied private right of action under a particular statute. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979).

The Seventh Circuit decision ignores aspects of § 13(d)'s legislative history which establish that § 13(d) was intended: (a) to bring to light information pertaining to persons who acquired stock through direct, open market acquisitions, as well as through tender offers; and (b) to provide information relevant to *potential* as well as *actual* or *imminent* contests for control.

The underlying purposes of § 13(d) were articulated by the Second Circuit in *GAF Corporation v. Milstein*, *supra*, which has been described as the "landmark" case with respect to private actions under § 13(d).[8] There, the Second Circuit noted that, "The purpose underlying § 13(d) is to *alert the marketplace and holders of the security* in question to *every* large rapid aggregation or accumulation of that security, regardless of the technique employed, which *might* reflect a *potential* change in corporate control". 453 F.2d at 717, emphasis added. *See also Indiana National Corp. v. Rich*, *supra*, 712 F.2d at 1183 (recognizing that § 13(d) is designed to address circumstances involving the "*potential for control*", citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) and S.Rep. No. 500, 90th Cong., 1st Sess. (1967)).

Moreover,

> The legislative history shows that the purpose of the Williams Act [of which § 13(d) was a part] was to close a gap in the disclosure requirements of existing securities laws by requiring full disclosure by persons or groups who "*purchase by direct acquisition* or by tender offers . . . substantial blocks of the securities of publicly held companies." 113 Cong.Rec. 24664 (1967).

Bath Industries, Inc. v. Blot, 427 F.2d 97, 102 (7th Cir. 1970), emphasis added. As recognized in that case,

> Senator Harrison A. Williams, Jr., of New Jersey, stated the purpose of his bill to be "to require the disclosure of pertinent information . . . when a person or group of persons seek to acquire a

8. *See Indiana National Corp. v. Rich*, *supra*, 712 F.2d at 1184; *Dan River, Inc. v. Unitex, Limited*, *supra*, 624 F.2d at 1222-1223.

> substantial block of equity securities of a corporation by a cash tender offer or *through the open market or privately negotiated purchases. . . .*"

Id., emphasis added.[9]

Indeed, the persons protected by § 13(d) include "investors in general as well as the stockholders of the specific corporation involved". 114 Cong.Rec. 21954, remarks of Senator Williams. Section 13(d) disclosures are essential to allow the marketplace to evaluate the issuer's stock properly — an evaluation that will then be reflected in the stock price. The focus in the legislative history upon § 13(d)'s applicability to direct acquisitions of stock, and upon benefits that flow to the marketplace as a whole from § 13(d) disclosures, is patently inconsistent with the Seventh Circuit's present limitation of § 13(d) actions solely to situations involving tender offers and contests for control. To the contrary, the legislative history reflects a Congressional concern that stockholders receive disclosures as soon as a person has acquired enough stock to create the *potential* for a *future* control contest.

The Seventh Circuit's decision creates an anomaly. Under the Seventh Circuit's decision, a person who intends to seek a change of control, and who is required by § 13(d) to disclose that intention, can deliberately withhold such disclosure. If a stockholder becomes aware of the 5% holder's undisclosed intention, that stockholder cannot sue to compel the required

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9. Yip and Ch'ien's ouster of Edelson and Beese stemmed from such a "privately negotiated transaction" — their purchase in early 2003 from a CDC stockholder of 4.5 million CDC shares (about 4% of the shares outstanding) for more than $11 million. As discussed below, the additional shares acquired by Yip and Ch'ien in this private transaction proved to be decisive in effecting Edelson's and Beese's removal from the Board.

disclosure. Instead, under the Seventh Circuit's formulation, the statutory violation would become actionable only if and when there actually is a "contest for control" — *i.e.*, only after the violator's intention has become known, and the contest for control is already being waged. Indeed, in the Seventh Circuit, an unscrupulous stock manipulator could affect the market price of a stock by filing misleading § 13(d) schedules with impunity, but with immunity from suit under § 13(d) as long as no contest for control ensues.[10]

In view of the Congressional intent to bring even *potential* control contests into the bright light of day, the Seventh Circuit's holding that § 13(d), a disclosure statute, cannot be enforced by private litigants until after that which was previously undisclosed has already become known, is, as the SEC stated at p. 27 of its *amicus* brief, utter "nonsense". The Seventh Circuit's limitation on the § 13(d) private right of action effectively destroys the efficacy of that statute as the "early warning" system Congress intended it to be.

IV. The Seventh Circuit's Decision Is Contrary To The Statutory Language.

The Seventh Circuit also purported to rely on the language of § 13(d) as a justification for its newly-created limitations. According to the Seventh Circuit, the statutory language reveals that "Congress was concerned with bringing to light acquisitions

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10. Of course, the Seventh Circuit decision would not preclude enforcement actions by the SEC. However, the SEC's resources are obviously inadequate to police the thousands of Schedule 13D and Schedule 13G filings that are made each year. Also, courts have recognized that the issuer, not the SEC, is in the best position to detect § 13(d) violations, and to seek redress for those violations. *GAF Corp. v. Milstein*, *supra*, 453 F.2d at 719; *Florida Commercial Banks v. Culverhouse*, *supra*, 772 F.2d at 1519.

of stock by only a specific type of investor", i.e., those who purchased a sufficient amount that "may allow the stockholder to exert some control over the issuer's actions". 405 F.3d at 632, App. A at 25a. However, Congress formulated a "bright line" test defining the "specific type of investor" with which it was concerned by requiring disclosures to be made by any person who acquires more than 5% of a class of securities — irrespective of whether that person has any control purpose or intent. Clearly, Congress considered 5% beneficial ownership to be the point at which there was a potential to "exert some control over the issuer's action." Here, the Yip/APOL interest in CDC was far in excess of the 5% threshold; prior to January 2003, Yip/APOL beneficially owned 14.36% of CDC, and after Yip's purchase of an additional 4.3 million shares from a CDC stockholder, their beneficial ownership increased to 18.61%.

Congress originally set the bar at 10%, but later lowered it to the present 5% level (*see* P.L. 91-567 (1970)). By lowering the threshold at which disclosure is required, Congress sought to bring to light promptly information concerning any circumstances that might signal a *potential* change of control. The statutory language is therefore inconsistent with the Seventh Circuit's decision that stockholders cannot sue under § 13(d) until an *actual* control contest has ensued.

The Seventh Circuit also stated that § 13(d) creates a "hierarchy of disclosure", with more disclosure being required of persons who have the purpose or intent to affect corporate control. 405 F.3d at 632, App. A at 25a-26a. The creation of this "hierarchy" supports Edelson's § 13(d) claim. Yip lied about his place in the hierarchy by affirmatively misrepresenting he was not seeking to change control over CDC, while he was orchestrating a clandestine plot to oust Edelson and Beese from the CDC Board (on orders from a Chinese government official to rid CDC of its U.S. directors, irrespective of requirements

imposed by the federal securities laws). If, as stated in *Indiana National*, a private right of action should be implied in order for "the objectives of the statute . . . to be realized" (712 F.2d at 1184), then a private right of action should be available to preclude a § 13(d) filer from misrepresenting that he or she is a passive investor when that person is really seeking to alter corporate control.[11]

The SEC recognized in its *amicus* brief (at 4, 15) that a § 13(d) filer must disclose the intention to vote for a change in the composition of the issuer's Board of Directors (citing Schedule 13D, Item 4(d)). This is consistent with the prevailing case law under § 13(d); "most courts have held that an investor must disclose the ultimate control purpose 'regardless of the definitiveness or even existence of any plans to implement this purpose.'" Li, "The Meaning of Item Four of Schedule 13D of the Securities Exchange Act of 1934: A New Framework and Analysis", 52 Bus.Law. 851, 862 (1997), quoting from *Chromalloy American Corp. v. Sun Chemical Corp.*, *supra*, 611 F.2d at 247.[12] As stated in *Chromalloy*, disclosure is required when a 5% stockholder "has a perceptible desire to influence substantially the issuer's operations" (611 F.2d at 246-247), because "Item 4 [of Schedule 13D] specifically requires the disclosure of a purpose to acquire control, regardless of the definitiveness or even the existence of any plans to implement this purpose." 611 F.2d at 247.

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11. As stated in *GAF Corp. v. Milstein*, *supra*, 453 F.2d at 720, the obligation to make disclosure under § 13(d) carries with it the duty to make *truthful* disclosures.

12. Li also cites *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*, 476 F.2d 687, 696-697 (2d Cir. 1973) and *Gearhart Industries, Inc. v. Smith International, Inc.*, *supra*, 741 F.2d at 712-715, 727 for this proposition.

The Seventh Circuit decision would encourage disingenuous control contestants do what Yip did here — file a false Schedule 13G disclaiming any control intention, secure in the knowledge that a stockholder would be unable to seek redress for that misrepresentation because no tender offer or other accumulation of stock will occur. The Seventh Circuit's decision creates an open invitation for unscrupulous individuals to launch the corporate "sneak attacks" that § 13(d) disclosure is intended to prevent.

Finally, the Seventh Circuit relied on the exemption in § 13(d)(6)(B) for acquisitions of less than 2% of a class within 12 months as establishing that Congress was concerned only with the "rapid purchase of stocks on the open market for the purpose of gaining control of the issuer". 405 F.3d at 632, App. A at 26a. By exempting acquisitions of less than 2% within a 12 month period, Congress defined what it considers to be a "rapid accumulation" that raises concerns regarding a person's *possible* or *potential* intent to seek control. If a person has acquired and accumulated stock in an amount and with a frequency that subjects that person to § 13(d)'s disclosure requirements, stockholders should not be precluded from bringing suit under § 13(d) if that person fails to make the required disclosures, or makes false or misleading disclosures, even if no tender offer or control contest is yet underway.

In short, as the SEC recognized (SEC *amicus* brief at 27-31), the Seventh Circuit's decision finds no support in the statutory language. Again, the decision undercuts the utility of § 13(d) as an early warning system intended to maintain market integrity and to prevent manipulation through prompt and honest disclosure.

V. The Seventh Circuit Decision Conflicts With This Court's Jurisprudence

The Seventh Circuit decision is also erroneous because it is inconsistent with Supreme Court decisions establishing that when Congress amends a statute which has been judicially construed as providing an implied private right of action, Congress intends to approve and ratify the private right of action so implied. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).[13] Courts have relied on this principle in explicitly recognizing a private right of action under § 13(d). *Indiana National, supra*, 712 F.2d at 1182-1183; *Florida Commercial Banks v. Culverhouse, supra*, 772 F.2d at 1518; *Jacobs v. Pabst Brewing Co., supra*, 549 F. Supp. at 1059-1061. These cases held that the § 13(d) private right of action was well-recognized by 1977, so the amendment of § 13(d) that year, without eliminating the private right of action, evidenced a Congressional intent to leave that private right of action intact and unaltered.

In 1995, Congress enacted the Private Securities Litigation Reform Act, P.L. 104-67, 109 Stat. 737, in which it dramatically altered the landscape of securities litigation. While imposing new requirements on claims under the federal securities laws, that comprehensive Act left the private action under § 13(d) completely untouched. Consequently, under *Merrill Lynch v. Curran*, *Herman & MacLean* and *Cannon v. University of*

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13. These decisions are simply a specific application of the holding of *Touche Ross & Co. v. Redington, supra*, 442 U.S. at 575-76, that legislative intent is the crucial factor in ascertaining whether a right of action should be implied from a federal statute that does not explicitly provide for private enforcement.

Chicago, it can be inferred that Congress acknowledged and reaffirmed the private right of action under § 13(d) as it existed prior to the Seventh Circuit's decision. Certiorari should be granted because the Seventh Circuit's decision is contrary to these controlling decisions.

VI. The Limitations Imposed By The Seventh Circuit Are Unworkable

Certiorari should also be granted because the Seventh Circuit has now created limitations and restrictions on the private right of action under § 13(d) that are vague, ambiguous and incomprehensible.

A distinct body of law has developed in connection with the provisions of the Williams Act governing tender offers, such as §§ 14(d) and 14(e) of the Exchange Act (15 U.S.C. §§ 78n(d), 78n(e)). Numerous cases have required significant expenditures of time and effort, on the part of courts and litigants, in determining whether various sets of circumstances constitute a "tender offer" subject to these statutory provisions and SEC rules. *See* SEC Release 34-43069, July 31, 2000 (recognizing that courts employ an *eight factor* test, citing *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985) and *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979)). Now, with respect to § 13(d) cases in the Seventh Circuit, that analysis will need to be employed merely in order to make the threshold determination of whether the plaintiff has a right of action under § 13(d).

Even if it is concluded that a particular situation does not involve a "tender offer", district courts in the Seventh Circuit will also be required to analyze whether the situation before them involves some other "accumulation or aggregation of stock that could affect corporate control". Almost every case involving

an alleged § 13(d) violation would arguably meet this standard, because Congress has determined that the "accumulation" or "aggregation" of more than 5% of a class "*could* affect corporate control". It is unclear exactly what types of cases would and would not meet the Seventh Circuit's new test for determining the availability of a private right of action under § 13(d).

The Seventh Circuit's erroneous determination that Edelson's claim does not meet its new standard illustrates that the Seventh Circuit's limitations and restrictions are not workable. This case clearly involves an accumulation or aggregation of stock for the purpose of altering corporate control. Among the shares voted against Edelson and Beese were the 4.3 million and 200,000 shares that Yip (through APOL) and Ch'ien (respectively) acquired in early 2003 from New World Infrastructure ("NWI"), a CDC stockholder that was then divesting itself of its ownership interest in CDC. As part of the same transaction, CDC acquired nearly 4.5 million shares from NWI for its treasury, thereby reducing the number of outstanding CDC shares. Yip's purchase, coupled with the reduction in the number of shares outstanding, increased Yip's stake in CDC from 14.36% to 18.61%.

The additional shares that Yip and Ch'ien acquired from NWI were decisive with respect to the results of the directors' election. Beese's reelection to the CDC Board was defeated by only 1,145,414 votes (405 F.3d at 623, App. A at 4a), so Yip's acquisition of an *additional* 4.3 million CDC shares, standing alone, was determinative in effecting Beese's ouster. Edelson would have been reelected, by a vote of approximately 27,766,947 to 23,764,956, if the approximately 9.0 million

shares that were acquired from NWI had been retained by that entity and voted in favor of Edelson.[14]

Thus, this case involves a quintessential battle for corporate control — the election of its directors — that was coupled with and effected through an acquisition of shares. By failing to make the disclosures required by § 13(d), Yip and Ch'ien were able to hatch a plot under which they conspired to buy, and to cause CDC to buy, a substantial block of stock from NWI, which was used to carry out their sneak attack on Edelson and Beese. Thus, even if a "contest for control" and an accompanying acquisition of additional stock are prerequisites to a shareholder's § 13(d) claim, Yip's and Ch'ien's undisclosed plan to remove Edelson and Beese from the Board satisfied these requirements, and CDC stockholders, including Edelson, have as much right to a remedy under § 13(d) for illegality associated with this type of "contest for control" as with respect to a tender offer or proxy fight. Therefore, even under the Seventh Circuit's new test, Edelson has a viable § 13(d) claim.

If the Seventh Circuit's limitations and conditions upon stockholder's § 13(d) claims led to an erroneous result in this case, the conclusion is inescapable that those conditions and limitations are not workable in determining when stockholders can sue under § 13(d), and when they cannot. This Court should

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14. As explained above, under SEC Rule 13d-1(e), once Yip decided to change control over CDC, he was required to file a Schedule 13D, and Yip's stock could not be voted until the Schedule 13D was filed. Since Yip failed to file a Schedule 13D, Yip's stock should not have been voted at all. The revised vote for Edelson set forth in the text was computed by adding the 9 million shares previously owned by NWI to the 18,766,947 shares actually voted in Edelson's favor at the meeting. The 23,764,956 revised total of the votes against Edelson was computed by subtracting the 4.5 million shares that Yip and Ch'ien obtained from the 28,264,956 shares cast against Edelson at the meeting.

grant certiorari to establish, in conformity with the decisional law of all other Circuits, that courts confronted with stockholder suits under § 13(d) are not required to make the nebulous determination concerning whether the situation involves a "tender offer or other accumulation or aggregation of stock that could affect corporate control".

CONCLUSION

For all the reasons stated above, Edelson requests the issuance of a writ of certiorari to correct the injustice that has been done to Edelson, and to restore to millions of public stockholders the rights of which they have been divested by the Seventh Circuit's decision in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 25, 2005

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 04-1299

HARRY EDELSON,

Plaintiff-Appellant,

v.

RAYMOND K.F. CH'IEN, PETER Y.H. YUNG, ASIA PACIFIC ONLINE, and CHINADOTCOM CORPORATION,

Defendants-Appellees.

Argued June 3, 2004—Decided April 25, 2005

Before BAUER, RIPPLE and MANION, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Harry Edelson brought the present action against chinadotcom corporation ("Chinadotcom"),[1] Raymond K.F. Ch'ien, Peter Yip Hak Yung and Asia Pacific Online for an alleged violation of § 13(d) of the Securities and Exchange Act ("Exchange Act"), 15 U.S.C. § 78m(d), and other

1. Although both parties refer to Chinadotcom without an initial capital, we employ the capital for ease of reading.

claims. Mr. Edelson sought preliminary and permanent injunctive relief as well as damages. The district court determined that Mr. Edelson could not sustain a private cause of action under § 13(d), denied Mr. Edelson injunctive relief and dismissed his § 13(d) claim. For the reasons set forth below, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

1. Changes in Chinadotcom's Board

Mr. Edelson served as an outside, non-management director on Chinadotcom's Board of Directors ("Board") from 1999 until 2003.[2] Chinadotcom is a Cayman Islands company, headquartered in Hong Kong; its stock trades on the NASDAQ exchange. Mr. Yip is Vice-Chairman of the Board and Chinadotcom's Chief Executive Officer ("CEO"); Mr. Ch'ien is Chinadotcom's Chairman of the Board. All three men, Mr. Edelson, Mr. Yip and Mr. Ch'ien, hold stock in Chinadotcom.[3]

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2. Because the case comes to us as an appeal from the grant of a motion to dismiss, all well-pleaded facts in the complaint are deemed true and all reasonable inferences from the facts are drawn in Mr. Edelson's favor. *See First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir.2002).

3. Asia Pacific Online Ltd. ("APOL") is record owner of 16,135,686 shares of Chinadotcom stock. APOL is owned by Mr. Yip's spouse and a trust established for the benefit of Mr. Yip's children. Mr. Yip's wife owns an additional 442,219 shares. According to the complaint, Mr. Yip is the beneficial owner of all of these shares.

Appendix A

Beginning in early 2003, Mr. Edelson began having serious disagreements with Chinadotcom's management, especially Mr. Yip and Mr. Ch'ien, regarding various governance issues. A major source of contention was the propriety of a company-sponsored stock buy-back program. Mr. Yip was in favor of the program according to which Chinadotcom would repurchase issued shares at $3.75 per share. Mr. Yip and Mr. Ch'ien would have benefitted personally from this buy-back because they recently had acquired additional Chinadotcom shares at less than $3.75 per share. Mr. Edelson and another board member, J. Carter Beese,[4] questioned the propriety and legality of the buy-back. Consequently, the Board requested that attorney Steven Chan determine if there were any legal or ethical obstacles to the plan.

This dispute remained unresolved at the March 18, 2003 Board meeting. It also prompted an April 16, 2003 e-mail from Mr. Edelson to Mr. Ch'ien in which Mr. Edelson alleged that the independent directors on the Board were being bulldozed in violation of the Sarbanes-Oxley Act, 15 U.S.C. § 7201 et seq., with the result that good corporate governance was being disregarded.

About the same time of the e-mail, the Board was in the process of nominating a new slate of directors. The terms of all three directors who served on the audit committee—Mr. Edelson, Beese and Thomas Britt—were set to expire. The annual meeting notice to Chinadotcom stockholders

4. Beese is a former member of the Securities and Exchange Commission ("SEC") and sat with Mr. Edelson on Chinadotcom's audit committee.

recommended the re-election of all three of these members of the Board; specifically, Mr. Edelson was recommended for a two-year directorship, Beese for a three-year directorship and Britt for a one-year directorship. The nominations were unopposed, and the election was uncontested. "Neither Yip nor Ch'ien asserted any outward or overt objection to Edelson's nomination for re-election to the Board, and they purported to concur in the Board's recommendation that Edelson and the other candidates be elected." R.1 ¶ 24.

At the June 17, 2003 Annual Meeting, Mr. Edelson and Beese were defeated in an election in which only forty-eight percent of the shares were voted. Of the votes cast, 18,766,947 shares were voted in favor of Mr. Edelson's re-election, 28,264,956 were voted against Mr. Edelson's re-election, and 800 abstained. The votes for Beese were closer in number: 18,800,491 votes were cast in favor of Beese's re-election, 19,945,905 against his re-election, and 8,285,307 abstained. Britt, on the other hand, received 46,910,753; only 121,150 shares voted against him, and there were 800 abstentions. The shares beneficially owned by Mr. Yip were voted against both Mr. Edelson and Beese; these shares constituted "more than two-thirds" of the votes cast against Mr. Edelson. R.1, ¶ 28.

2. Mr. Yip Files Disclosures

Mr. Yip, as beneficial owner of more than five percent of the issued and outstanding shares of a class of Chinadotcom stock, is required to file certain disclosures under § 13(d) of the Exchange Act, 15 U.S.C. § 78m(d). By

rule, a shareholder may file a less-onerous disclosure form, Schedule 13G, if the individual submitting the filing "[h]as not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer." 17 C.F.R. § 240.13D-1(C)(1).

On January 8, 2003, Mr. Yip filed a Schedule 13G disclosure. The following certification appears on the Schedule 13G form, which was signed by Mr. Yip:

> By signing below I certify that, to the best of my knowledge and belief, the securities referred to above were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect.

R.1, Ex.A at 4. No subsequent schedule was filed prior to Mr. Yip's voting of his shares against Mr. Edelson and Beese at the 2003 shareholder meeting.

B. District Court Proceedings

On October 15, 2003, Mr. Edelson filed the present action. His two-count complaint alleged violations of § 13(d) as well as tortious interference with prospective economic advantage. Mr. Edelson sought damages as well as preliminary and permanent injunctive relief. "The intent of the requested injunction," Mr. Edelson stated in his separate motion for a preliminary injunction, "is simply to prevent

chinadotcom from conducting a stockholders meeting that would deprive Edelson, a former chinadotcom Director, of the opportunity to campaign to regain his chinadotcom Board seat." R.36, Ex.A at 1.

Chinadotcom opposed Mr. Edelson's motion for a preliminary injunction and also moved to dismiss Mr. Edelson's complaint.[5] With respect to the preliminary injunction, Chinadotcom argued first that Mr. Edelson could not show a likelihood of prevailing on the merits because he had not alleged any wrongdoing by Chinadotcom. Additionally, the company argued that Mr. Edelson lacked standing to bring a § 13(d) action because Congress did not intend § 13(d) to be a mechanism for ex-directors to settle old feuds. Chinadotcom also maintained that the premise underlying Mr. Edelson's argument—that Mr. Yip's action in voting against the recommended slate of directors evidenced an intent to control Chinadotcom—was faulty. According to Chinadotcom, Mr. "Edelson's construction of Rule 13d-1(e)(1), taken to its logical conclusion, would mean that no Schedule 13G filer would ever be able [to] vote its securities in a board election or any other proposal at a shareholder meeting without first filing a Schedule 13D because the mere voting of securities is . . . equivalent to 'changing or influencing control of the issuer.' " R.4 at 10. Finally, Chinadotcom posited that Mr. Edelson could not establish irreparable harm if the injunction did not issue. Chinadotcom pointed to the fact that the election that had

5. Chinadotcom was the only defendant that had been served at the time of the briefing described above and the disposition of the motion to dismiss. Consequently, Chinadotcom is the only defendant before this court on appeal.

ousted Mr. Edelson already had occurred—any harm already had taken place. Therefore, Mr. Edelson did not establish the need for urgency that typically accompanies a preliminary injunction.

In addition to opposing the motion for preliminary injunctive relief, Chinadotcom also moved to dismiss the complaint. In its motion, Chinadotcom reiterated its argument that Mr. Edelson had failed to allege any wrongdoing on its part—a necessity to sustain the complaint: "Though chinadotcom is included as a defendant, the Complaint fails to allege any act or omission by chinadotcom which would constitute a violation of Section 13(d). Indeed, Edelson has not even alleged that chinadotcom is subject to the reporting requirements of Section 13(d)." R.16 at 5. Chinadotcom also renewed its claim that Mr. Edelson lacked standing to pursue a § 13(d) private cause of action. According to Chinadotcom, a § 13(d) cause of action was not open to ex-directors seeking "to get back at their previous co-fiduciaries for disagreements or squabbles lost along the way." *Id.* at 12 (internal quotation marks and citations omitted).

By order of January 28, 2004, the district court denied Mr. Edelson's request for injunctive relief and dismissed Count I of Mr. Edelson's complaint.[6] After outlining the standards for a preliminary injunction, the district court held

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6. Mr. Edelson had moved to amend his complaint to add Chinadotcom as a defendant in Count II. As part of its order, the district court granted Mr. Edelson leave to file an amended complaint addressed only to this count. The propriety of the district court's order granting Mr. Edelson leave to amend his complaint is not before the court.

that a preliminary injunction was not warranted in this case because Mr. Edelson "cannot show a likelihood of success on the merits of his claim." R.27 at 4. Indeed, the court determined Chinadotcom's motion to dismiss should be granted because Mr. Edelson was not entitled to the protections—including the implied cause of action—of § 13(d). The district court noted that, in *Indiana National Corp. v. Rich*, 712 F.2d 1180 (7th Cir.1983), this court had recognized the existence of an implied cause of action for prospective relief for issuers such as Chinadotcom to remedy violations of § 13(d). However, the district court believed that *Indiana National* must be read in conjunction with more recent district court opinions which held that a disappointed former director of a corporation could not pursue an implied cause of action under § 13(d). *See Mates v. N. American Vaccine, Inc.*, 53 F.Supp.2d 814 (D.Md.1999); *Nowling v. Aero Serv. Int'l, Inc.*, 752 F.Supp. 1304 (E.D.La.1990). The court explained:

> This Court declines to extend the ruling of the Seventh Circuit and create a new cause of action under Section 13(d) for former directors whom management has ousted. If there is a spectrum of shareholder sophistication, with "unsuspecting investors" on one end, and "well-informed members of management who can adequately protect their own interests" on the other, then Edelson certainly lies closer to management than to the common shareholder.

R.27 at 12. The court concluded that Congress "did not intend former directors to wield Section 13(d) on their own behalf"

and, therefore, dismissed Count I of the complaint. Mr. Edelson timely appealed.[7]

II

DISCUSSION

The gravamen of Mr. Edelson's complaint is that Mr. Yip's intent to vote against Mr. Edelson amounted to an intent to influence the governance of Chinadotcom. Because Mr. Yip failed to disclose this intent and to file the required Schedule 13D, Mr. Edelson contends that Mr. Yip's votes against him should not have been counted, and a new election for directors must be held.

Mr. Edelson's action raises fundamental issues regarding § 13(d) and the contours of the implied right of action thereunder. First, the present action raises the issue of the scope of the private right of action under § 13(d)—specifically, whether Mr. Yip's failure to disclose his intent, under the circumstances presented here, is sufficient to state a cause of action. The second issue raised by Mr. Edelson's appeal is who may bring a cause of action under § 13(d): Does Mr. Edelson's status as a former director preclude him from invoking the protections guaranteed general shareholders by § 13(d)? Finally, this action also poses the question whether an issuer—as opposed to an individual shareholder—can be a proper defendant to a § 13(d) cause of action, here Chinadotcom. Because we hold that, under

7. After oral argument, at the request of this court, the SEC submitted a brief addressing some of the issues presented in this litigation. We express our appreciation to the SEC for its submission.

the circumstances of this case, a shareholder may not institute a private cause of action pursuant to § 13(d), we have no occasion to address whether Mr. Edelson is a proper plaintiff or whether Chinadotcom is a proper defendant.

A. The Evolution of Private Causes of Action Under § 13(d)

Our first task is to discern whether the allegations contained in Mr. Edelson's complaint, specifically, Mr. Yip's failure to disclose his intent to vote his shares against a sitting director, states a claim under § 13(d). Although we have not had an occasion to address the specific question presented to us, we do not write on a clean slate with respect to the nature and contours of the § 13(d) private right of action. Almost thirty years ago, this court explicitly recognized that § 13(d) created a private cause of action. *See Indiana Nat'l*, 712 F.2d at 1185. Even before that time, this court and the Supreme Court had discussed the scope of § 13(d) and the parameters of an implied right of action based on that provision, as well as on other provisions of the Williams Act, Pub.L. No. 90-439, 82 Stat. 454 (1968). We turn first to these cases to guide our inquiry.

Our review begins with the decision of this court in *Bath Industries, Inc. v. Blot*, 427 F.2d 97 (7th Cir.1970). Before the court was an order by the district court enjoining the appellant stockholders from "proceeding with their plan (including, but not limited to removing the chief executive officer of (plaintiff) Bath and calling for a special shareholders meeting) until they have complied with Section 13(d)." *Id.* at 101 (internal quotation marks omitted). None

of the named defendants owned, individually, ten percent or more of the stock of Bath Industries.[8] Thus, this court first had to determine whether the individual defendants constituted a "group" acting "for the purpose of acquiring, holding, or disposing of securities of an issuer," such that, collectively, they were subject to the Act's disclosure requirements. *Id.* at 108. In order to answer this question, we stated, it was necessary to "honor the whole Congressional intent" of the Williams Act, not just the specific passages relied upon by the parties. To assess this intent, we turned to the legislative history of the Williams Act which

> convince[d] us that the overriding purpose of Congress in enacting this legislation was to protect the individual investor when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the corporation should be managed.

Id. With this intent in mind, we concluded that "the Act should be interpreted to require compliance with its disclosure provisions when, but only when, any group of stockholders owning more than 10% of the outstanding shares of a corporation agree to act in concert to *acquire* additional shares." *Id.* (emphasis added).[9]

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8. The Williams Act's disclosure requirements originally applied to individuals who owned ten percent, as opposed to five percent, of a specific class of stock.

9. The Second Circuit in *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir.1971), reached a different result with respect to when the (Cont'd)

Appendix A

The Supreme Court provided additional insight into the scope of private causes of action under § 13(d) in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 95 S.Ct. 2069, 45 L.Ed.2d 12 (1975). In *Rondeau*, the Court addressed the issue "whether a showing of irreparable harm [wa]s necessary for a private litigant to obtain injunctive relief in a suit under § 13(d)." *Id.* at 50-51, 95 S.Ct. 2069. In that case, petitioner Rondeau, over time, had accumulated a large quantity of Mosinee stock. When Rondeau had acquired the threshold amount of five percent of the stock, he failed to make the disclosures required by § 13(d). Rondeau eventually accumulated 60,000 shares of stock. At that time, Mosinee's president advised Rondeau that his purchases may have

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(Cont'd)

disclosure requirements come into play for investors that agree to use their shares as a block:

> In light of the statutory purpose as we view it, we find ourselves in disagreement with the interpretation of Bath Industries. . . . The history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchas[illegible] and whose actions were, therefore, more apparent. . . . It hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock.

Id. at 718 (citations and footnote omitted; emphasis in original). As will be discussed in greater detail below, the distinction drawn by the Second Circuit—between new acquisitions and new aggregations of stock— does not affect the outcome in the present action.

created problems under the federal securities laws. After receiving this warning, Rondeau ceased purchases, consulted an attorney and subsequently filed a § 13(d) disclosure which stated:

> "Francis A. Rondeau determined during [the] early part of 1971 that the common stock of the Issuer (respondent) was undervalued in the over-the-counter market and represented a good investment vehicle for future income and appreciation. Francis A. Rondeau and his associates presently propose to seek to acquire additional common stock of the Issuer in order to obtain effective control of the Issuer, but such investments as originally determined were and are not necessarily made with this objective in mind. Consideration is currently being given to making a public cash tender offer to the shareholders of the Issuer at a price which will reflect current quoted prices for such stock with some premium added."
>
> Petitioner also stated that, in the event that he did obtain control of respondent, he would consider making changes in management "in an effort to provide a Board of Directors which is more representative of all of the shareholders, particularly those outside of present management. . . ." One month later petitioner amended the form to reflect more accurately the allocation of shares between himself and his companies.

Id. at 53-54, 95 S.Ct. 2069. After receiving the disclosure, Mosinee informed its stockholders of the information

provided by Rondeau and also responded to Rondeau's plans to seek control of the company and effect changes in the management structure. Mosinee then filed an action in district court seeking "an injunction prohibiting the petitioner and his codefendants from voting or pledging their stock and from acquiring additional shares, requiring them to divest themselves of stock which they already owned." *Id.* at 55, 95 S.Ct. 2069.

The Supreme Court held that the traditional requirements for injunctive relief apply to implied causes of action under § 13(d). The Court then rejected Mosinee's claim that it had suffered the harm necessary to obtain injunctive relief. The Court explained that

> [t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. By requiring disclosure of information to the target corporation as well as the Securities Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.

Id. at 58, 95 S.Ct. 2069 (footnote omitted). Additionally, the Court noted that "none of the evils to which the Williams

Act was directed ha[d] occurred or [wa]s threatened in this case," *id.* at 59, 95 S.Ct. 2069; Rondeau had not attempted to control the issuer, either by cash tender offer or other device. Finally, the Court also made clear that both the focus of the Williams Act and the private remedies available under the Act were limited:

> Nor are we impressed by respondent's argument that an injunction is necessary to protect the interests of its shareholders who either sold their stock to petitioner at predisclosure prices or would not have invested had they known that a takeover bid was imminent. As observed, the principal object of the Williams Act is *to solve the dilemma of shareholders desiring to respond to a cash tender offer*, and it is not at all clear that the type of "harm" identified by respondent is redressable under its provisions.

Id. at 59-60, 95 S.Ct. 2069 (citations omitted; emphasis added).

Soon thereafter, the Supreme Court confronted an action instituted under another provision of the Williams Act. In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), the Court addressed whether a tender offeror could institute a cause of action under the Williams Act's anti-fraud provision, U.S.C. § 78n(e).[10] The

10. 15 U.S.C. § 78n(e) provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material

(Cont'd)

Court reviewed the legislative history and underlying purpose of the Act. The Court concluded that "[t]he legislative history . . . shows that the sole purpose of the Williams Act was the protection for investors who are confronted with a tender offer." *Piper*, 430 U.S. at 35, 97 S.Ct. 926. The Court then concluded that, given this legislative purpose, Chris-Craft, a tender offeror competing for control of Piper, could not claim the protections of the anti-fraud provisions of the Act. The Court explained:

> It is clear, therefore, that Chris-Craft has not asserted standing under § 14(e) as a Piper shareholder. The reason is not hard to divine. As a tender offeror actively engaged in competing for Piper stock, Chris-Craft was not in the posture of a target shareholder confronted with the decision of whether to tender or retain its stock. Consequently, Chris-Craft could scarcely have

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(Cont'd)

> fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

> alleged a need for the disclosures mandated by the Williams Act.

Id. The Court concluded that "[a]s a party whose previously unregulated conduct was purposefully brought under federal control by the statute, Chris-Craft can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." *Id.* at 37, 97 S.Ct. 926. Although the *Piper* case concerns private causes of action under § 14(e), as opposed to § 13(d), it is instructive for two reasons. First, *Piper* shows the emphasis that courts should place on discerning congressional intent before recognizing an implied cause of action under the circumstances of a given case. Second, *Piper* reveals the Supreme Court's determination of congressional intent in enacting the Williams Act—to provide stockholders with information when they are "confronted with the decision of whether to tender or retain [their] stock." *Id.* at 35, 97 S.Ct. 926.

Slightly more recently, this court has considered, and explicitly recognized, a private cause of action under § 13(d) in *Indiana National Corp. v. Rich*, 712 F.2d 1180 (7th Cir.1983). The issue before the court in *Indiana National* was "whether there is an implied private right of action for an issuer corporation to seek injunctive relief [on behalf of its shareholders] under Section 13(d)." *Id.* at 1181. The defendants in that case were a group of investors who had acquired more than five percent of Indiana National stock and had filed a § 13(d) disclosure, as well as several amendments. Despite these disclosures, an action was initiated by Indiana National, alleging that the disclosures were false and misleading because they failed to reveal the

defendants' intention to acquire control. Indiana National sought an order compelling the defendants to file an amended Schedule 13D, enjoining the defendants from acquiring more shares of the company, and compelling the defendants to divest themselves of the shares which had been unlawfully acquired.

To determine whether an implied cause of action should be recognized under these circumstances, we took our cue from the methodology employed by the Supreme Court in Williams Act cases and looked to the legislative history of the Williams Act. We noted that "[t]he purpose of the Williams Act was to insure that public shareholders *facing a tender offer or the acquisition by a third party of a large block of shares possibly involving a contest for control* be armed with adequate information about the qualifications and intentions of the party making the offer or acquiring the shares." *Id.* at 1183 (emphasis added). We also addressed the question of whether the issuer could enforce the provisions on behalf of shareholders. Congress, we noted, did not intend the Williams Act "to protect incumbent management or to discourage takeover bids"; "[i]ts sole purpose was the protection of shareholders." *Id.* at 1185. However, we observed that

> the shareholders have neither the knowledge nor the capacity to ensure that Section 13(d) is enforced and a "fair fight" thus provided. In this respect and for this limited purpose, therefore, the issuer corporation acts on the shareholders' behalf in bringing a suit for injunctive relief until an accurate Schedule 13(d) is filed.

Id. Having determined that the issuer could institute the action on behalf of its shareholders, we remanded the action to the district court to consider the propriety of injunctive relief.

Our review of these cases provides significant guidance in the interpretive task before us. In exploring the contours of a private cause of action under § 13(d), or other sections of the Williams Act, both this court and the Supreme Court have been guided by congressional intent in enacting the Williams Act: "to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Rondeau*, 422 U.S. at 58, 95 S.Ct. 2069 (citing S.Rep. No. 550, at 2 (1967)); *see also Piper*, 430 U.S. at 28, 97 S.Ct. 926 ("Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies."); *Indiana Nat'l*, 712 F.2d at 1183 ("The purpose of the Williams Act was to insure that public shareholders facing a tender offer or the acquisition by a third party of a large block of shares possibly involving a contest for control be armed with adequate information about the qualifications and intentions of the party making the offer or acquiring the shares."); *Bath Indus.*, 427 F.2d at 109 ("[T]he overriding purpose of Congress in enacting this legislation was to protect the individual investor when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the corporation should be managed.").

This purpose not only has informed our general discussion of § 13(d), it has been employed to fashion the scope of the implied cause of action recognized under § 13(d) and under other sections of the Williams Act. By way of example, the Act's emphasis on acquisition of shares prevented us from recognizing that a "group" could be liable under § 13(d) absent a showing that it had "acquire[d]" additional shares towards an undisclosed purpose. *See Bath Indus.*, 427 F.2d at 109-10. Relying on the Act's purpose of providing information to investors—as opposed to providing management with a weapon to combat takeover bids—the Court held that the traditional standards for gaining injunctive relief applied to a cause of action brought pursuant to § 13(d). *See Rondeau*, 422 U.S. at 58-59, 95 S.Ct. 2069. Similarly, it was the purpose of the Williams Act that prevented the Supreme Court from expanding the class of plaintiffs in Williams Act cases to include a competing tender offeror. *Piper*, 430 U.S. at 35, 97 S.Ct. 926.

Finally, we note that, to this point, our Williams Act jurisprudence has been limited to those situations which involved acquisitions or accumulations of stock for the alleged (or actual) purpose of gaining control of the issuer. We have not confronted the question before us today—whether a plaintiff may maintain a cause of action for a violation of § 13(d) absent a tender offer or accumulation of stock for the purpose of controlling the issuer. We turn, therefore, to the question of whether we should recognize a § 13(d) cause of action under the circumstances of this case.

Appendix A

B. The Scope of § 13(d) Private Rights of Action

1.

The circumstances under which courts can recognize implied rights of action have changed over time. Historically, courts looked to the four factors set forth in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), to inform the decision; those factors are:

> (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and (4) whether the cause of action is one traditionally relegated to the states so that it would be inappropriate to infer a federal remedy.

Mallett v. Wisconsin Div. of Vocational Rehab., 130 F.3d 1245 (7th Cir.1997). However, not long after its decision in *Cort*, the Court made it clear that not all of these factors were of equal value:

> It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create,

> either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent.

Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). Although "the Supreme Court has refused to overrule the *Cort v. Ash* test explicitly, the Court has retreated from it and has focused primarily on legislative intent, the second factor." *Mallett*, 130 F.3d at 1249. Consequently, in determining whether to recognize an implied cause of action under a specific act of Congress, we have identified our inquiry as "whether Congress intended an implied right of action . . . in light of the statute's language, structure, and legislative history. If such inferences of intent are not present, we must conclude that the essential predicate for implication of a private remedy does not exist." *Id.* (internal quotation marks and citations omitted).

The emphasis on congressional intent as manifested in statutory language is not limited to the initial recognition of an implied right of action. This methodology applies with equal force to expanding the scope of an implied right of action. The Supreme Court has explained that

> [a]ssessing the legitimacy of . . . extension or expansion calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute, the first of which was not, in fact, the considered focus

> of the *Borak* opinion. The rule that has emerged in the years since *Borak* . . . came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). From this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991) (parallel citations omitted). Applying the Court's admonition to the issue presented here, we must ask whether Congress intended the private cause of action for alleged violations of § 13(d) to extend to individual investors who are not faced with a tender offer or some other aggregation of stock for the purpose of controlling the issuer.

2.

The parties have very different views concerning Congress' intent in enacting § 13(d). Chinadotcom maintains that the legislative history of the Williams Act shows that the sole purpose of the Act was the protection of investors confronted by a tender offer. *See Piper*, 430 U.S. at 28, 97 S.Ct. 926. As noted above, this characterization has been oft-repeated by courts that have addressed § 13(d) claims. *See, e.g., Bath Indus.*, 427 F.2d at 109 ("Our review of the legislative history convinces us that the overriding purpose

of Congress was to protect the individual investor when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the operation should be managed.").

Mr. Edelson and the Securities and Exchange Commission ("SEC") take a broader view of congressional intent with respect to § 13(d). They acknowledge that the "increase in cash tender offers was the genesis of the Williams Act." SEC Br. at 27. However, they assert that there is nothing in the language of the statute to suggest that § 13(d) is limited only to the tender offer context. Mr. Edelson and the SEC point to the fact that "[t]he statute itself is broadly written and contains no restriction of its coverage to accumulations of stock made as part of a tender offer." SEC Br. at 27. Furthermore, they note that the statute "expressly requires disclosure even where there is no control-purpose or contest for control." *Id.* at 29. They also point to the implementing regulations in support of their position.

The question of the existence—and scope—"of a statutory cause of action is, of course, one of statutory construction." *Touche Ross*, 442 U.S. at 568, 99 S.Ct. 2479. We look first, therefore, to the statutory language of § 13(d) to discern whether Congress intended a private cause of action to lie outside of the context of a tender offer or other aggregation of stock. "[I]n determining congressional intent, we look to the particular statutory language at issue, as well as the design of the statute as a whole." *Damato v. Hermanson*, 153 F.3d 464, 471 (7th Cir.1998) (internal quotation marks and citations omitted).

Appendix A

Our review of § 13(d) leads us to the conclusion that it was designed to provide information to the investor when faced with a tender offer or other accumulation or aggregation of stock that could affect corporate control. Although Mr. Edelson and the SEC are correct that Congress did not employ the term "tender offer" anywhere in § 13(d), the language of the statute does make clear that its focus is the acquisition of securities for the purpose of controlling the issuer. First, the provision's disclosure requirements are triggered by an individual "*acquiring* directly or indirectly the beneficial ownership" of five percent of any class of security. 15 U.S.C. § 78m(d)(1) (emphasis added). When a stockholder reaches the five percent threshold, he must disclose certain information set forth in § 13(d); among the disclosures that must be made is whether "the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities." § 78m(d)(1)(C). However, the statute also provides that the SEC may impose less onerous disclosure requirements if it appears to the SEC that the securities were acquired by an investor "in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer." § 78m(d)(5).

It is clear from this language that Congress was concerned with bringing to light acquisitions of stock by only a specific type of investor. First, Congress only subjects investors to the disclosure requirements if they have acquired a threshold amount of five percent of a class of the issuer's stock—an amount that may allow the stockholder to exert some control over the issuer's actions. Second, the provision allows for a hierarchy of disclosures—a streamlined version

available to the investor who has acquired the stock in the regular course of business and without any intention of affecting the operations of the issuer and a more onerous version applicable to the investor who plans to use his leverage to exert control over the issuer. The first category of investors obviously is of less concern to Congress.

The categories of transactions that Congress excepted from § 13(d) disclosures further reveals Congress' focus on tender offers or other aggregations of stock that may result in a change in control of the issuer. For example, 15 U.S.C. § 78m(d)(6)(B) states that the disclosure requirements shall not apply to "*any acquisition of the beneficial ownership* of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class." (emphasis added). This exception suggests that, although Congress was directing its efforts at acquisitions of stock in general, it was more concerned with acquisitions of large amounts of stock over a short period of time, i.e., a tender offer or the rapid purchase of stocks on the open market for the purpose of gaining control of the issuer.

Congress' textual focus on acquisitions of stock with a control purpose is consistent with the legislative history of § 13(d). As set forth in some detail above, this court, other courts of appeals and the Supreme Court have scoured the legislative history of the Williams Act to discern Congress' intent in enacting § 13(d). Without fail, the courts that have examined the legislative history have arrived at the same conclusion: In enacting § 78m(d), Congress sought to empower the common investor with adequate information

regarding those seeking control of an issuer through a tender offer or other method of acquisition so that an individual investor is able to decide whether to retain or dispose of his stock. *See supra* at 629-30. In short, there does not appear to be any indication in the language of § 13(d) that Congress intended a remedy for individual investors who were not faced with the choice of retaining or disposing of their stock in the face of an imminent change in control.

Despite the emphasis in both the language of the statute and its legislative history on large and rapid acquisitions that may affect control of the issuer, the SEC and Mr. Edelson argue strenuously that Congress intended the private right of action to be available under much broader circumstances.

Mr. Edelson and the SEC argue that Congress must have intended a private cause of action, even in the absence of a tender offer or contest for control, because the statute requires anyone who owns five percent or more of a class of stock to make certain disclosures, regardless of his intent in acquiring the stock. However, the mere fact that Congress decided to regulate a particular activity does not evidence an intent to create a private cause of action to enforce every aspect of that regulatory scheme.[11] It is logical that Congress would want to keep its

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11. The Supreme Court made this clear in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), when it considered whether a private cause of action existed under another section of the Securities Exchange Act that regulated broker-dealers; the Court stated:

> Section 17(a) is like provisions in countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant

(Cont'd)

finger on the pulse of those shareholders who may, at some point in the future, be in a position to, and actively attempt to, affect the rights of other shareholders. However, until a large shareholder begins acquiring shares for the purpose of controlling the issuer, the rights of other shareholders are not implicated. It is only when control of the issuer is at stake that fellow stockholders are faced with decisions concerning their stock, are in need of the information required by § 13(d) to make those decisions and should have the right to secure that information to protect their investment.

Mr. Edelson and the SEC next point to the language of the implementing regulations on Schedule 13D as authority for their position. *See* SEC Br. at 22. However, we cannot look at the implementing regulations with the same authority as we do statutory language and legislative history in discerning whether Congress intended to recognize a private cause of action under the facts of this case; "the language of the statute and not the rules must control." *Touche Ross*, 442 U.S. at 577 n. 18, 99 S.Ct. 2479 (rejecting argument that the rules adopted pursuant to an act of Congress can "provide the source of an implied remedy" when the statute itself cannot).

Finally, we cannot accept the view of the SEC and of Mr. Edelson that there is case law to support their view of

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> governmental authorities to perform their regulatory functions. The reports and records provide the regulatory authorities with the necessary information to oversee compliance with and enforce the various statutes and regulations with which they are concerned.

Id. at 569, 99 S.Ct. 2479.

§ 13(d)'s purpose. Neither Mr. Edelson nor the SEC has pointed to a single case that has recognized a § 13(d) action in the absence of some accumulation or aggregation of stock, or other contest for control.[12] Thus, Mr. Edelson and the SEC have not dissuaded us from the conclusion that a private cause of action pursuant to § 13(d) arises only in the context of a tender offer or aggregation of shares for the purpose of controlling the issuer.

C. Application

Having concluded that Congress intended to recognize a private cause of action under § 13(d) only in the context of a tender offer or other contest for control, our disposition of Mr. Edelson's claim is straightforward. Mr. Yip's action in voting against Mr. Edelson simply is not the type of activity which Congress intended to regulate through private enforcement under § 13(d).

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12. The SEC cites four cases in support of its argument that § 13(d) private causes of action should not be limited to tender offers or other contests for control. None of these cases support its claim. *See Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 713 (5th Cir.1984) (involving rapid acquisition of stock to attain a "blocking position" to any defensive efforts by the issuer); *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 365-66 (2d Cir.1980) (addressing alleged failure to disclose a purpose to control when shareholder had acquired in excess of one-third of the outstanding stock of the issuer); *Chromalloy American Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 243-44 (8th Cir.1979) (involving acquisition of more than ten percent of the outstanding stock without disclosing a control purpose); *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 96 (1st Cir.1977) (considering § 13(d) liability of group of shareholders that collectively had acquired nearly fifteen percent of the outstanding stock of the issuer).

Appendix A

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JANUARY 28, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 C 7320

HARRY EDELSON,

Plaintiff,

v.

RAYMOND K.F. CH'IEN, PETER YIP HAK YUNG, ASIA PACIFIC ONLINE LTD., and CHINADOTCOM CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge

Plaintiff Harry Edelson has moved for a preliminary injunction based on his Complaint for violations of Section 13(d) of the Securities Exchange Act (the "Act").[1] 15 U.S.C.

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1. Plaintiff is not explicit as to what counts of his Complaint support his motion for preliminary injunction. From his briefs, (Cont'd)

§ 78m(d). Plaintiff has also moved for leave to amend his Complaint in response to Defendant's motion to dismiss. For the reasons set forth below, Plaintiff's motion for preliminary injunction is denied. Further, because Section 13(d) does not provide a private cause of action for a Plaintiff such as Edelson, the Court dismisses Count I of Plaintiff's Complaint and denies Plaintiff's motion to file an Amended Complaint as to Counts I and II of the proposed Amended Complaint. With regard to Count III of Plaintiff's proposed Amended Complaint, Plaintiff's motion to amend is granted.

BACKGROUND

Plaintiff Harry Edelson is a shareholder and former director of Defendant chinadotcom corporation ("Chinadotcom").[2] Chinadotcom is a Cayman Islands corporation headquartered in Hong Kong. Chinadotcom is an "integrated enterprise solutions company" publicly traded through the NASDAQ stock market. Defendant Peter Yip is also a shareholder of Chinadotcom, and is the company's Vice-Chairman and Chief Executive Officer ("CEO").

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however, it appears that his motion is based solely on the alleged violations of 13(d). During the pendency of the motion for preliminary injunction, Plaintiff filed a motion to amend his Complaint to include Chinadotcom in the tortious interference claim and to add an additional count under 13(d) requesting an injunction against Chinadotcom.

2. Both parties' briefs eschew capitalization in reference to Defendant chinadotcom. The Court uses an initial capital for ease of stylistic use.

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Defendant Ch'ien is Executive Chairman of Chinadotcom. Defendant Asia Pacific Online Limited ("APOL") is a Cayman Islands corporation headquartered in the Cayman Islands. APOL is owned by Yip's spouse and his children's trust. In turn, APOL owns a significant amount of Chinadotcom stock.

At least as early as 2003, Edelson openly disagreed with Yip and Ch'ien regarding the governance of Chinadotcom. In particular, Edelson alleges that he questioned the motives of management in connection with a stock repurchase program. In a series of board meetings and related email correspondence, Edelson contends that he expressed concerns that the stock repurchase represented a conflict of interest on the part of Yip and Ch'ien, who had acquired stock at prices lower than the proposed company buy-back. In an April 16, 2003, e-mail to Ch'ien, Edelson accused Chinadotcom management of "bulldozing" the board of directors and cited management's "defensive hostility" in the face of dissent.

Meanwhile, Chinadotcom was preparing to elect three directors, as the terms of Edelson and two other directors would expire in 2003. The board and management of Chinadotcom nominated Edelson and the two other current directors for re-election, giving notice of this nomination to the shareholders on May 22, 2003. The Board recommended to the shareholders that they vote in favor of each re-election. Edelson, however, alleges that Yip and Ch'ien were merely "lying in wait." Edelson's Complaint asserts that Yip and Ch'ien "purported to concur with the Board's recommendation . . . ." but then voted their shares against Edelson's election. (R. 18-1, Am.Compl.¶ 25.)

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On June 17, 2003, a majority of the shares represented in the election voted against Edelson. Edelson now blames his loss on the unforeseen votes of Yip and Ch'ien. According to Edelson, his requests for more detailed information about the election results have gone unheeded by Chinadotcom. On October 15, 2003, Edelson filed this lawsuit. Plaintiff's Complaint alleges that Defendants Yip and APOL violated Section 13(d) of the Act by concealing their intention to affect the control of Chinadotcom. In a separate count of the proposed Amended Complaint, Plaintiff accuses Chinadotcom of a Section 13(d) violation for improperly recognizing the votes of Yip and Ch'ien. Plaintiff also accuses Defendants of tortious interference with prospective business advantage.

Plaintiff moved for a preliminary injunction requesting several types of relief. In response, Defendant Chinadotcom argues, among other things, that Section 13(d) does not provide a private cause of action for Plaintiff in this case. The Court agrees.

LEGAL STANDARDS

I. Preliminary Injunction

To obtain a preliminary injunction, a party must first show (1) that it has a reasonable likelihood of success on the merits of its underlying claim; (2) that it has no adequate remedy at law; and (3) that it will suffer irreparable harm without the preliminary injunction. *AM General Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 803-804 (7th Cir.2002) (citing *Anderson v. U.S.F. Logistics (IMC), Inc.*,

274 F.3d 470, 474 (7th Cir.2001) and *Re/Max North Central, Inc. v. Cook*, 272 F.3d 424, 429-30 (7th Cir.2001)). If a Plaintiff meets those burdens, the court then must consider any irreparable harm the preliminary injunction might impose upon the party against whom the injunction is sought and whether the preliminary injunction would harm or foster the public interest. *Id.* If the moving party cannot show a likelihood of success on the merits, a court may deny a motion for preliminary injunction without further discussion. *Id.* at 830 (citing *Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 730 (7th Cir.1998)).

As discussed below, Plaintiff Edelson cannot show a likelihood of success on the merits of his claim. Accordingly, the Court need not address the other factors relevant to a preliminary injunction analysis.

II. Motion to Amend

Plaintiff also seeks to amend his Complaint. Courts generally address motions to amend the pleadings under a fairly liberal standard. *Jones v. Hamelman*, 869 F.2d 1023, 1026 (7th Cir.1989). This standard, however, does not guarantee a right to amend. If an amended complaint would not survive a motion to dismiss or a motion for summary judgment, then the amendment would be considered futile, and the Court will not permit it for the sake of judicial efficiency. *See Brunt v. Service Employees Intern. Union*, 284 F.3d 715, 720-21 (7th Cir.2002) ("Because Appellants' amended complaint would not survive a motion to dismiss, the amendment would be futile and the district court was well within its discretion in refusing to grant leave to amend.").

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With respect to a motion to dismiss for failure to state a claim, a court will only grant such a motion if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. Fed.R.Civ.P. 12(b)(6); *Delgado v. Jones*, 282 F.3d 511, 515 (7th Cir.2002). In assessing a motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the complaint, and also draws all reasonable inferences from those facts in favor of the plaintiff. *First Ins. Funding Corp. v. Federal Ins. Co.*, 284 F.3d 799, 804 (7th Cir.2002) (citing *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 521 (7th Cir.2001)). Plaintiff cannot satisfy his pleading requirements, however, by merely attaching bare legal conclusions to narrated facts which fail to outline the bases of their claims. *See Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir.1991); *Strauss v. City of Chicago*, 760 F.2d 765, 767-68 (7th Cir.1985) (absence of facts supporting plaintiff's claim renders allegations mere legal conclusions subject to dismissal).

ANALYSIS

I. Section 13(d) Disclosure

Section 13(d) of the Act[3] creates certain filing obligations

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3. Section 13(d)(1) provides, *inter alia*, "any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 781 of this title . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive

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for any person who owns or acquires 5% or more of a class of publicly traded securities. If such a person does not hold the securities "for the purpose or effect of changing or influencing the control of the issuer," then he need not file the comprehensive Schedule 13D disclosures, and may file the simpler Schedule 13G instead. SEC Rule 13d-1(c). If, however, the person intends to change or influence control of the issuer, SEC Rule 13d-1(e)(1) requires that person to file a Schedule 13D disclosing such intentions. Moreover, that person is precluded from voting or directing the voting of the described securities for ten days after the Schedule 13D is filed. SEC Rule 13d-1(e)(2).

Plaintiff seeks to enforce Section 13(d) and the accompanying SEC rules against Defendants Yip, APOL, and Chinadotcom. Reasoning that Yip never made the requisite Schedule 13D disclosure when he allegedly intended to remove Plaintiff from the board, Plaintiff contends that Section 13(d) and the SEC rules preclude Yip from voting his Chinadotcom shares. Accordingly, Plaintiff argues, Chinadotcom should have ignored Yip's improper votes. Defendant responds by meeting Plaintiff at the threshold of

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office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest of for the protection of investors. . . ."

Section 13(d)(2) requires filing of amendments upon "any material change in the facts set forth" in such statements.

his argument. Defendant contends that Section 13(d) does not provide a private cause of action for Plaintiffs such as Edelson.

II. Implied Private Causes of Action under Section 13(d)

In this case, Edelson attempts to enforce Section 13(d) as a stockholder and former director of Chinadotcom. He argues that he is entitled, as a shareholder, to a private right of action under Section 13(d). Defendant argues that the Seventh Circuit has recognized a right of action on the part of issuer corporations, but not for former directors who are also stockholders. The Court agrees that Section 13(d) does not grant a private right of action in this case.

A. Implied Causes of Action Are Not Favored

It is undisputed that the express language of Section 13(d) does not provide a private cause of action by any person. The parties dispute whether or not a suit by Edelson is impliedly allowed under this law. A party attempting to assert an implied right of action must overcome the "strong presumption [that] exists against the creation of an implied private right of action. . . ." *Endsley v. City of Chicago*, 230 F.3d 276, 281 (7th Cir.2000). Nevertheless, "[a]lthough implied causes of action have fallen into disfavor, the Supreme Court has not yet forbidden them." *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1277 (7th Cir.1995). In the law of implied private causes of action, *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), is a seminal case. In that case, the Court established a four-factor test for determining whether a private right of action is

implied.[4] The *Cort* test, however, has "fallen under severe criticism" by the Supreme Court, and may no longer stand as the test for implied rights of action. *Mallet v. Wis. Div. Of Vocational Rehab.*, 130 F.3d 1245, 1249 (7th Cir.1997); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979); *Indiana Nat'l Corp.*, 712 F.2d at 1182.

Retreating from the full *Cort v. Ash* test, the Supreme Court has focused primarily on legislative intent to analyze potential implied rights of action. *Mallet*, 130 F.3d at 1249 (citing *Suter v. Artist M.*, 503 U.S. 347, 364, 112 S.Ct. 1360, 1370, 118 L.Ed.2d 1 (1992)). "Without evidence of congressional intent to imply a private right of action, we will not address the remaining *Cort* factors because the plaintiff will have failed to show any ability to shift the presumption against its creation." *Mallet*, 130 F.3d at 1249. The threshold inquiry for an implied right of action, therefore, is to determine whether Congress intended to provide one "in light of the statute's language, structure, and legislative history." *Id.*

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4. Courts considered the following factors under *Cort v. Ash:* (1) whether the plaintiff is a member of a class for whose especial benefit the statute was enacted; (2) whether there is any explicit or implicit indication of congressional intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law. *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1182 (7th Cir.1983) (citing *Cort v. Ash*, 422 U.S. at 78).

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B. No Implied Cause of Action Exists for Plaintiff

Beginning with the plain language of the statute, Plaintiff does not contend that any portion of the text of Section 13(d) implies legislative intent to provide a private cause of action. Absent evidence of an implied right of action in the plain language, the Court must address the statute's structure and history under the dictates of *Mallet.*

The Seventh Circuit analyzed implied private rights of action and Section 13(d) in the *Indiana National* case. *Indiana Nat'l Corp.*, 712 F.2d at 1182. In that case, an issuer corporation sued a group of investors, alleging that the investors filed a Schedule 13D that was misleading in several respects. In the district court, the defendants successfully argued that the plaintiff, as issuer of the stock, had no standing to assert a claim under Section 13(d) of the Act. *Id.* On appeal, the Seventh Circuit considered the narrow issue of whether an issuer corporation has an implied right of action under Section 13(d). *Id.*

To answer this question, the court pointed to the Supreme Court's opinion in *Cannon v. University of Chicago*, 441 U.S. 677, 694-703, 99 S.Ct. 1946, 1956- 61, 60 L.Ed.2d 560 (1979). Addressing implied rights in Title IX of the Education Amendments of 1972, the Supreme Court noted that Title IX had been patterned after Title VI of the Civil Rights Act of 1964, which had been construed by the courts as creating a private right of action. *Id.* The Supreme Court presumed that Congress was aware of the judicial decisions finding an implied right of action in Title VI, and therefore found that Congress must have intended to provide the same

right in Title IX. *Id.* at 696-99. Using this reasoning, the Seventh Circuit noted that not only was Section 13(d) modeled on a statute in which courts had already found a right by implication (Section 14(a) of the Act, 15 U.S.C. § 78n), but Section 13(d) had itself been amended - after courts had found an implied right of action - without excluding such implication. *Indiana Nat'l*, 712 F.2d at 1183.

The Seventh Circuit's opinion includes a detailed analysis of the legislative history of Section 13(d), finding that "the purpose of the Williams Act was to insure that public shareholders facing a tender offer or the acquisition by a third party of a large block of shares possibly involving a contest for control be armed with adequate information about the qualifications and intentions of the party making the offer or acquiring the shares." *Id.* (citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58, 95 S.Ct. 2069, 2075-76, 45 L.Ed.2d 12 (1975)). "It is, of course, clear from the legislative history that Section 13(d) was not intended to protect incumbent management or to discourage takeover bids. . . . Its sole purpose was the protection of shareholders." *Indiana Nat'l*, 712 F.3d at 1185. Based on its analysis of the legislative history of Section 13(d), the Seventh Circuit found that the statute included an implied private cause of action for issuer corporations, who may "in this respect and for this limited purpose . . . act[ ] on the shareholders' behalf in bringing a suit for injunctive relief until an accurate Schedule 13(d) is filed." *Id.*

Two cases in distant districts are also informative on this issue. *See Nowling v. Aero Serv. Int'l, Inc.*, 752 F.Supp. 1304 (E.D.La.1990); *Mates v. N. Am. Vaccine, Inc.*, 53 F.Supp.2d

814 (D.Md.1999). The plaintiff in *Nowling* was a shareholder and former president and CEO of the defendant corporation. *Nowling*, 752 F.Supp. at 1313. Holding that the plaintiff had no standing to sue under Section 13(d), the court noted the legislative intent to protect shareholders and remarked that the plaintiff in that case "cannot simply be looked upon as a shareholder . . ." when he was president and CEO of the company. *Id.* The court noted that Section 13(d) was intended to protect the investing public, and not "ex-presidents or ex-board members who want to get back at their previous co-fiduciaries for disagreements or squabbles lost along the way."[5] *Id.*

In *Mates*, the District Court in Maryland addressed the question of whether Section 13(d) provided a private right of action to a former director of a corporation. The court considered whether the former director could be distinguished from the plaintiff in *Nowling* in that the *Mates* plaintiff did not have access to the relevant information in that case. *Mates*, 53 F.Supp.2d at 825. The *Mates* court ultimately found that the former director did have access to the relevant information, but also pointed out that the main thrust of the plaintiff's suit was brought "in her individual capacity as a former board member, and not as a shareholder." *Id.* Finding that the former director did not have standing under Section 13(d), the court noted that the legislative history of the law showed an intent to protect "unsuspecting investors, and not well-informed members of management who can adequately protect their own interests." *Id.* (citing

5. The *Nowling* court also noted that the plaintiff "had full access to the information that was considered regarding the proposed sales and participated in the voting." *Nowling*, 752 F.Supp. at 1313.

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Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 28-29, 97 S.Ct. 926, 942-43, 51 L.Ed.2d 124 (1977)).

By his own account, Edelson was an active member of the Chinadotcom board of directors. In that role, he was privy to meetings that were not attended by common shareholders. Plaintiff's Complaint centers around Defendants' alleged misrepresentation in connection with the election of board members. Had he known that Defendants were planning to remove him, Edelson contends, he would have solicited proxies from the shareholders at large to prevent his ouster from the board. Plaintiff has alleged that such solicitation would likely result in his re-election. Although Plaintiff complains that key information was withheld from him, he falls short of showing that he is a member of the class that Section 13(d) was intended to protect.

Edelson's Complaint defines four types of injury that he claims to have sustained as a result of Defendants' alleged Section 13(d) violation.[6] Of these four injuries, only one relates to his role as a shareholder: Edelson claims to have

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6. "The § 13 violation of Yip and APOL caused irreparable injury to Edelson in that it (without limitation): (a) resulted in an illegal and improper removal of Edelson from the chinadotcom Board; (b) precluded him from having a full and fair opportunity to solicit proxies in favor of his retention on the APOL [*sic*] Board; (c) precluded him from serving as a director of chinadotcom, and thereby prevented him from attempting to exercise influence on the policies and direction of the company; and (d) essentially disenfranchised him (as well as chinadotcom's other stockholders) by causing him and them to believe that they were participating in an uncontested election of directors when, in fact, the election was opposed." (R. 18-1, Pl.'s Mot. for Leave to Am. Compl. Ex. A ¶ 38.)

been disenfranchised by Defendants because he, and other shareholders, did not know the election was contested. Edelson does not, however, contend that he refrained from voting his shares in reliance on the Defendants' representations. As a shareholder, then, it appears that Edelson would have done nothing differently had he known of the Defendants' alleged scheme. Rather, he contends that he would have sought proxies in order to offset Yip's large voting blocks. Although Plaintiff claims to have been disenfranchised, he does not claim that his votes were not cast and counted. His injury, therefore, appears to be more appropriately viewed as an injury to a former director and not to a shareholder. As such, Edelson's claim is not impliedly allowed by Section 13(d).

This result is in line with the reasoning of the Seventh Circuit in the *Indiana National* case. That opinion merely recognized a private right of action on the part of issuer corporations. This Court declines to extend the ruling of the Seventh Circuit and create a new cause of action under Section 13(d) for former directors whom management has ousted. If there is a spectrum of shareholder sophistication, with "unsuspecting investors" on one end, and "well-informed members of management who can adequately protect their own interests" on the other, then Edelson certainly lies closer to management than to the common shareholder. *See Mates*, 53 F.Supp.2d at 825. Because the legislature did not intend former directors to wield Section 13(d) on their own behalf, Plaintiff's Count I is dismissed and Plaintiff's motion to amend is denied with respect to Counts I and II.

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III. Tortious Interference

Plaintiff seeks to amend his claim of tortious interference with prospective business advantage against Defendants Yip and Ch'ien to add Defendant Chinadotcom.[7] Plaintiff's allegations against Chinadotcom focus on a subsequent lawsuit brought by Chinadotcom against Edelson in Hong Kong and a related press release issued by Chinadotcom. Plaintiff alleges that he had a reasonable expectation to be nominated to the boards of additional entities. Because of the damage to his reputation caused by Defendants' alleged activities, Plaintiff asserts that Defendants have interfered with this expectation. Defendant Chinadotcom[8] argues that under New Jersey law a tortious interference claim based on the filing of a lawsuit would fail under a Rule 12(b)(6) motion to dismiss.[9] Further, Chinadotcom argues that the doctrine

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7. The Court has dismissed the federal-question claims in this action. The Court retains diversity jurisdiction, however, as complete diversity exists between a New Jersey Plaintiff and foreign Defendants, and the alleged amount in controversy is sufficient. 28 U.S.C. § 1332(a)(2).

8. Defendants Yip and Ch'ien have not moved for dismissal of Plaintiff's tortious interference claims against them. There is a dispute as to whether Yip and Ch'ien have been properly served. Plaintiff argues that Yip and Ch'ien have waived any objection to lack of service because Chinadotcom and the individual Defendants share counsel, who has appeared and participated in this action. Defendant maintains that Yip and Ch'ien are not properly before this Court without having been served.

9. Chinadotcom asserts, and Plaintiff does not object, that under Illinois choice-of-law rules, the substantive law of the State of New

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of *forum non conveniens* would also require the dismissal of such a claim. Because these claims would fall prey to dismissal motions, Chinadotcom argues that the Court should not allow their addition to Plaintiff's Complaint.

A. The Litigation Privilege is Inapplicable

Chinadotcom claims that New Jersey law provides a litigation privilege that protects litigants from being sued for tortious interference based on statements made during a proceeding. In a single footnote, Defendant argues, without providing any authority, that "[b]ecause the filing of the lawsuit is immunized, Edelson cannot be heard to complain that the issuance of a press release discussing this litigation - a matter of public record and of concern to its shareholders - is actionable conduct on chinadotcom's part." Plaintiff, on the other hand, responds that Chinadotcom's press release concerning its Hong Kong lawsuit is not governed by the litigation privilege cited by Chinadotcom.[10] The Court agrees.

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Jersey governs the tortious interference claim in this case. "A court sitting in diversity applies the choice-of-law rules of the state in which it sits." *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500, 503 (7th Cir.1998). Illinois law places significant weight on the location of the injury, which in this case is New Jersey, where the alleged injury to reputation was felt. *Medline Indus., Inc. v. Maersk Med. Ltd., 230 F.Supp.2d 857, 864 (N.D.Ill.2002).* The Court will analyze the validity of Plaintiff's tortious interference claim with respect to New Jersey state law.

10. Plaintiff does not respond directly to the litigation privilege argument, but rather points to the out-of-court statements made by

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While it is true that statements made during litigation are protected from defamation and tortious interference suits, the same is not true for out-of-court statements made about litigation. "A full, fair and accurate report of a judicial proceeding is qualifiedly privileged, although the report contains matters that would otherwise be defamatory and actionable, and no action will lie therefor except on proof of malice in making it." *Cappello v. Scott*, 274 N.J.Super. 282, 284, 644 A.2d 102, 103 (N.J.Super.A.D.1994). In New Jersey, a tortious-interference plaintiff must show: "(1) that it had a reasonable expectation of an economic advantage; (2) that was lost as a direct result of defendants' malicious interference; and (3) that it suffered losses thereby." *M. Eagles Tool Warehouse, Inc. v. Fisher Tooling Co., Inc.*, 205 F.Supp.2d 306, 320 (D.N.J.2002). Plaintiff has plead these elements in connection with the press release issued by Chinadotcom. With respect to this claim, Chinadotcom has not shown that under no set of facts would plaintiff's allegations entitle him to relief. *Pope v. Smith-Rothchild Financial Co.*, No. 03 C 3335, 2003 WL 22889377, *2 (N.D.Ill.Dec.8, 2003); *see Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir.1999); *Kennedy v. National Juvenile Det. Ass'n*, 187 F.3d 690, 695 (7th Cir.1999). Plaintiff's claim of tortious interference against Chinadotcom would therefore survive dismissal, and this Court will not bar amendment based on Defendant's Rule 12(b)(6) objection.

(Cont'd)

Defendant. The litigation privilege applies to the actual litigation proceedings pending in Hong Kong. To the extent Plaintiff's tortious interference claim relies on the litigation proceedings - and not out-of-court statements - Plaintiff's claim is dismissed.

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B. *Forum Non Conveniens* Does Not Prevent the Claim

Turning to Defendant's second objection, "[a] *forum non conveniens* analysis takes place in two steps. First, the court must determine whether an adequate alternative forum is available; second, it must weigh several private and public interest factors related to the proper location for the litigation." *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 643 (7th Cir.2003); *see Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 718 (7th Cir.2002). The movant must overcome the strong presumption in favor of the plaintiff's choice of forum. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir.1990).

While Defendant can show that Hong Kong is an adequate alternative forum for the remaining claim, its arguments in favor of public and private interests cannot overcome the strong presumption that Illinois is the appropriate forum. Defendant argues that this claim will turn on issues of Hong Kong law because it is intertwined with the Hong Kong action against Edelson. Tortious interference claims based on Defendants' press release or the activities that supported Plaintiff's purported Section 13(d) claim are not contingent on the outcome of any Hong Kong court proceeding.[11] It is not clear, therefore, that Hong Kong has any superior public interest in hearing this dispute.

Similarly, the private interests of the litigants do not outweigh the presumption in favor of Illinois. The Plaintiff

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11. Defendant Chinadotcom does not consider the effect of the claims against the individual Defendants.

is a United States citizen whose choice of venue is entitled to deference. Although Defendant Chinadotcom operates in Hong Kong, it is incorporated in the Cayman Islands. Yip and Ch'ien are residents of Hong Kong, but there has been no showing that continuing this proceeding in Illinois would have any adverse effect on them. In sum, the private interests of the litigants weigh in favor of keeping the lawsuit in Illinois. Defendant's forum objections fail, and Plaintiff's motion to amend his Complaint is granted with respect to his claim against Chinadotcom for tortious interference with prospective business relations.

CONCLUSION

Plaintiff's motion for preliminary injunction is denied. Plaintiff's motion for leave amend his Complaint is granted in part and denied in part. Count I of the original Complaint is dismissed. Plaintiff can amend his Complaint consistent with this opinion with respect to proposed Count III only.

Dated: January 28, 2004

ENTERED
s/ Amy J. St. Eve
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 27, 2005

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 27, 2005

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 04-1299

HARRY EDELSON,

Plaintiff-Appellant,

v.

RAYMOND K.F. CH'IEN, PETER J.H. YUNG, ASIA PACIFIC ONLINE, and CHINADOTCOM CORPORATION,

Defendants-Appellees.

Appendix C

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 7320

Amy J. St. Eve, *Judge.*

ORDER

Upon consideration of Plaintiff-Appellant's petition for rehearing and suggestion of rehearing en banc, filed on May 9, 2005, no judge in active service[1] has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

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1. Chief Judge Flaum did not participate in the consideration of this petition for rehearing and suggestion of rehearing en banc.

APPENDIX D — STATUTE AND REGULATIONS INVOLVED

Section 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d))

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d)(6) of Title 43, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

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(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

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(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Appendix D

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 [15 U.S.C.A. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

Appendix D

SEC Rule 13d-1 (17 C.F.R. § 240.13d-1)
Filing of Schedules 13D and 13G.

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101).

* * *

(c) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D (§ 240.13d-101) may, in lieu thereof, file with the Commission, within 10 days after an acquisition described in paragraph (a) of this section, a short-form statement on Schedule 13G (§ 240.13d-102). Provided, That the person:

(1) Has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d-3(b);

(2) Is not a person reporting pursuant to paragraph (b)(1) of this section; and

(3) Is not directly or indirectly the beneficial owner of 20 percent or more of the class.

* * *

(e)(1) Notwithstanding paragraphs (b) and (c) of this section and § 240.13d-2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G (§ 240.13d-102) pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to §§ 240.13d-1(a) and 240.13d-2(a) and shall file a statement on Schedule 13D (§ 240.13d-101) within 10 days if, and shall remain subject to those requirements for so long as, the person:

(i) Has acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to § 240.13d-3(b); and

(ii) Is at that time the beneficial owner of more than five percent of a class of equity securities described in § 240.13d-1(i).

(2) From the time the person has acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect until the expiration of the tenth day from the date of the filing of the Schedule 13D (§ 240.13d-101) pursuant to this section, that person shall not:

(i) Vote or direct the voting of the securities described therein; or

(ii) Acquire an additional beneficial ownership interest in any equity securities of the issuer of the securities, nor of any person controlling the issuer.

(f)(1) Notwithstanding paragraph (c) of this section and § 240.13d-2(b), persons reporting on Schedule 13G (§ 240.13d-102) pursuant to paragraph (c) of this section shall immediately become subject to §§ 240.13d-1(a) and 240.13d-2(a) and shall remain subject to those requirements for so long as, and shall file a statement on Schedule 13D (§ 240.13d-101) within 10 days of the date on which, the person's beneficial ownership equals or exceeds 20 percent of the class of equity securities.

(2) From the time of the acquisition of 20 percent or more of the class of equity securities until the expiration of the tenth day from the date of the filing of the Schedule 13D (§ 240.13d-101) pursuant to this section, the person shall not:

(i) Vote or direct the voting of the securities described therein, or

(ii) Acquire an additional beneficial ownership interest in any equity securities of the issuer of the securities, nor of any person controlling the issuer.

(g) Any person who has reported an acquisition of securities in a statement on Schedule 13G (§ 240.13d-102) pursuant to paragraph (b) of this section, or has become obligated to report on the Schedule 13G (§ 240.13d-102) but has not yet filed the Schedule, and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section or determines that it no longer has acquired or holds the securities in the ordinary course of business shall immediately become subject to § 240.13d-1(a) or § 240.13d-1(c) (if the person satisfies the requirements specified in § 240.13d-1(c)), and §§ 240.13d-2 (a), (b) or (d), and shall file, within 10 days thereafter, a statement on Schedule 13D (§ 240.13d-101) or amendment to Schedule 13G, as applicable, if the person is a beneficial owner at that time of more than five percent of the class of equity securities.

Appendix D

SEC Rule 13d-2 (17 C.F.R. § 240.13d-2)
Filing of amendments to Schedules 13D or 13G.

(a) If any material change occurs in the facts set forth in the Schedule 13D (§ 240.13d-101) required by § 240.13d-1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change. An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed "material" for purposes of this section; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances.

(b) Notwithstanding paragraph (a) of this section, and provided that the person filing a Schedule 13G (§ 240.13d-102) pursuant to § 240.13d-1(b) or § 240.13d-1(c) continues to meet the requirements set forth therein, any person who has filed a Schedule 13G (§ 240.13d-102) pursuant to § 240.13d-1(b), § 240.13d-1(c) or § 240.13d-1(d) shall amend the statement within forty-five days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule: Provided, however, That an amendment need not be filed with respect to a change in the

percent of class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file pursuant to § 240.13d-1.

* * *

(d) Any person relying on § 240.13d-1(c) and has filed its initial Schedule 13G (§ 240.13d-102) pursuant to that paragraph shall, in addition to filing any amendments pursuant to § 240.13d-2(b), file an amendment on Schedule 13G (§ 240.13d-102) promptly upon acquiring, directly or indirectly, greater than 10 percent of a class of equity securities specified in § 240.13d-1(d), and thereafter promptly upon increasing or decreasing its beneficial ownership by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (d).

* * *

Note to § 240.13d-2: For persons filing a short-form statement pursuant to Rule 13d-1 (b) or (c), see also Rules 13d-1 (e), (f), and (g).

Supreme Court, U.S.
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No. 05-399

IN THE

Supreme Court of the United States

HARRY EDELSON,

Petitioner,

v.

CDC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT CDC CORPORATION'S BRIEF IN OPPOSITION

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January 17, 2006

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QUESTION PRESENTED

Whether the court of appeals properly declined to expand the scope of the implied private right of action under § 13(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(d)) in order to provide a cause of action against the corporation in favor of a former board member who had been voted off the board by the corporation's shareholders, a claim which arises outside the context of a tender offer or other accumulation of stock for the purpose of obtaining control of the corporation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, CDC Corporation has no parent corporation. No publicly held company owns 10% or more of CDC Corporation's stock.

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IN THE

Supreme Court of the United States

No. 05-399

HARRY EDELSON,

Petitioner,

v.

CDC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT CDC CORPORATION'S BRIEF IN OPPOSITION

CDC Corporation respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Harry Edelson.

COUNTERSTATEMENT OF THE CASE

Petitioner is a shareholder and former member of the board of directors of Respondent CDC Corporation. At CDC's 2003 Annual General Meeting, CDC's shareholders voted on whether to retain Petitioner as a member of CDC's board of directors. Petitioner did not receive the votes necessary to retain his seat on CDC's board. Nearly four months later, Petitioner sued CDC, claiming that the shareholder vote that removed him from CDC's board of directors was tainted by a violation of § 13(d) of the Securities Exchange Act of 1934.

I. STATUTORY BACKGROUND.

Section 13(d) was adopted in 1968 as part of the Williams Act amendments to the Securities Exchange Act of 1934. The Williams Act amendments were a response "to the growing use of cash tender offers as a means for achieving corporate takeovers." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977). Prior to the Williams Act, cash tender offers — unlike other corporate control contests — were not subject to the disclosure requirements of the federal securities laws. *Id.* The Williams Act was proposed in 1965 "to remedy this gap in federal regulation." *Id.*

The legislative history of the Williams Act "shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Id.* at 35. The Congress that enacted the Williams Act understood that "corporate raiders" and "takeover pirates" could place investors in an awkward position by offering to purchase a controlling interest of shares in the issuer, which would provide a shareholder an opportunity to sell some, but not all, of his or her shares to the offeror.

> "In these instances, he will remain a shareholder in the company, under a new management which he helped to install without knowing whether it will be good or bad for the company.
>
> . . . Without knowledge of who the bidder is and what he plans to do . . . [a shareholder] cannot reach an informed decision [regarding whether to hold or sell shares of stock.]"

Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 n.8 (1975) (quoting S. Rep. No. 90-550, at 2 (1967)). The "purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Id.* at 58. Thus, the "principal object of the Williams Act is to solve

the dilemma of shareholders" in this situation by requiring the takeover bidder to provide the shareholder with information sufficient to allow the shareholder to make an informed decision with respect to the disposition of his or her shares. *Id.* at 60.

Section 13(d) accomplishes its purpose by alerting shareholders to any "large accumulation of stock by a party that might potentially affect the company's control." *Amicus Curiae* Brief of Securities And Exchange Commission at 2, *Edelson v. Ch'ien*, 405 F.3d 620 (7th Cir. 2005) ("Comm'n *Amicus* Br."). Accordingly, § 13(d) requires any person who acquires "the beneficial owner[ship] of more than 5 per centum," of any class of securities subject to registration under Section 12 of the Exchange Act to send to the issuer and to the SEC a disclosure statement containing information related to the size of the acquisition and whether or not there is a control purpose attendant to the acquisition. 15 U.S.C. § 78m(d)(1).

Shareholders may fulfill their disclosure obligation under § 13(d) by filing either a Schedule 13D or Schedule 13G. 17 C.F.R. § 240.13d-102. A disclosing person with no intention to change or influence the control of the issuer may disclose its ownership on the shorter, less burdensome, Schedule 13G. Section 13(d) requires shareholders who have formed an intention to "acquire control of the business of the issuer" to disclose any "plans or proposals" that the shareholder may have to liquidate the issuer, sell its assets, merge it with any other business or "to make any other major change to the business or corporate structure." 15 U.S.C. § 78m(d)(1)(C). These disclosures must be made on the more detailed Schedule 13D. Issuer corporations are explicitly exempted from the provisions of § 13(d) by Subsection 13(d)(6)(C), which states that the provisions of § 13(d) shall not apply to "any acquisition of an equity security by the issuer of such security."

II. THE DISTRICT COURT PROCEEDINGS.

Petitioner's complaint alleged that a violation of § 13(d) occurred when Peter Yip, who was at that time CDC's chief executive officer and the vice-chairman of its board of directors, voted shares he controlled (shares legally owned by Asia Pacific Online Limited ("APOL"), an entity owned by Mr. Yip's wife and a trust established for the benefit of Mr. Yip's children) against Petitioner's retention on CDC's board of directors without first disclosing his intention to vote against Petitioner's retention in a Schedule 13D disclosure form. Petitioner's original complaint did not allege a violation of § 13(d) by CDC, but instead admitted that CDC had been included as a party to the action "in order to assure a complete adjudication of the issue, and so that binding and effective injunctive relief may be granted." Complaint at ¶ 37, *Edelson v. Ch'ien*, No. 03 C 7320 (N.D. Ill. filed Oct. 15, 2003). Petitioner later alleged that CDC violated § 13(d) when it recognized and counted the shares that Mr. Yip directed be voted against petitioner's retention on the board. Petitioner also asserted claims against Mr. Yip and APOL, as well as Mr. Ch'ien, the Chairman of CDC's board of directors, but his claims against those parties were dismissed for want of personal jurisdicition. Petitioner sought an order declaring the board election in which he was rejected void, and requiring a new election to be held by CDC.[1]

Shortly after filing the complaint, but fully four months after the vote alleged to have been tainted by a violation of § 13(d), Petitioner filed a motion for preliminary injunction. That motion sought an order governing the manner in which CDC should provide notice to Petitioner of any future meetings of CDC shareholders. In addition, the motion

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[1] In addition, petitioner sought damages based on his allegations of tortious interference with prospective economic advantage. That claim is not germane to the petition.

sought an order compelling CDC to produce certain documents that Petitioner requested in the Complaint.

CDC opposed the motion for preliminary injunction, arguing that (1) Petitioner did not have standing to bring a claim under § 13(d) in his capacity as a former director of CDC; (2) Petitioner failed to allege a violation of § 13(d) by CDC; and (3) Petitioner had failed to demonstrate a likelihood of success on the merits of his § 13(d) claim because he had failed to allege that any defendant had acquired or held shares for the purpose of changing the control of CDC, which would trigger the disclosure requirement under § 13(d). While Petitioner's motion for preliminary injunction was pending, CDC filed a motion to dismiss the complaint. Like CDC's opposition to Petitioner's motion for preliminary injunction, the motion to dismiss argued that Petitioner had failed to allege a violation of § 13(d) by CDC and that Petitioner did not have standing to bring a claim under § 13(d) in his capacity as a former director of the corporation.

In a memorandum opinion and order addressing both motions, the district court granted CDC's motion to dismiss with respect to Petitioner's § 13(d) claim on the ground that Petitioner did not have a private right of action under § 13(d).[2] Accordingly, the district court denied Petitioner's motion for preliminary injunction because Petitioner could not demonstrate a likelihood of success on the merits of his § 13(d) claim.

III. THE DECISION BELOW.

Petitioner appealed the district court's interlocutory order denying the motion for preliminary injunction to the Seventh

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[2] Petitioner's claim for tortious interference with prospective economic advantage survived CDC's motion to dismiss. The district court granted CDC's motion for summary judgment with respect to the tortious interference claim on November 9, 2005. *Edelson v. Ch'ien*, No. 03 C 7320, 2005 U.S. Dist. LEXIS 27050 (N.D. Ill. Nov. 9, 2005).

Circuit. Because CDC was the only defendant that had been served with the complaint at the time of the disposition of the motion for preliminary injunction and the motion to dismiss, CDC was the only defendant before the Seventh Circuit on Petitioner's appeal. In addition to the briefs from the parties, the Seventh Circuit requested that the SEC file a brief as *amicus curiae*. Though the SEC disagreed with CDC's views as to the scope of the Williams Act, of which § 13(d) is a part, it explicitly acknowledged that CDC — the only defendant before the Seventh Circuit and the only defendant before this Court — "did not violate § 13(d)." Comm'n *Amicus* Br. at 13, n.10.

After examining the statutory language and the case law interpreting § 13(d), the Seventh Circuit concluded that § 13(d) "was designed to provide information to the investor when faced with a tender offer or other accumulation or aggregation of stock that could affect corporate control." *Edelson v. Ch'ien*, 405 F.3d 620, 632 (7th Cir. 2005). The Seventh Circuit noted that "there does not appear to be any indication in the language of § 13(d) that Congress intended a remedy for individual shareholders who were not faced with the choice of retaining or disposing of their stock in the face of an imminent change in control." *Id.* at 633. Because Petitioner was not faced with the choice of retaining or disposing of stock in the face of an imminent change in control, the Seventh Circuit held that "under the circumstances of this case, a shareholder may not institute a private cause of action pursuant to § 13(d)." *Id.* at 625.

REASONS FOR DENYING THE PETITION

Petitioner claims that in ruling that there is no private right of action under §13(d) absent a tender offer or accumulation of stock for the purpose of acquiring control of the issuer, the Seventh Circuit created a split of authority with all of the First, Second, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. Pet. 11-12. There is no such split. All of the

decisions from other circuits cited by petitioner in fact involved private efforts to sue under § 13(d) in the context of a tender offer or acquisition of shares for the purpose of acquiring control of the issuer. Far from a split of authority, the decision below is the first Court of Appeals decision addressing the question whether a private plaintiff may maintain a cause of action for a violation of § 13(d) absent a tender offer or accumulation of stock for the purpose of acquiring control of the issuer. There is no urgency requiring this Court's immediate consideration of an issue that is so immature.

Even if there were a split, which there is not, this case would provide a particularly poor vehicle for this Court's review of the issue. The only respondent before this Court, CDC, is not even alleged to have had any disclosure obligations under § 13(d). CDC did not try to exercise control over itself, and, in any event, issuers of securities like CDC are specifically exempted from § 13(d)'s disclosure obligations. 15 U.S.C. § 78m(d)(6)(C). Petitioner contends only that Mr. Yip (really APOL) had an obligation to file a Schedule 13D, and that Mr. Ch'ien's cooperation with Mr. Yip should have been disclosed. But petitioner was never able to establish the district court's personal jurisdiction over Mr. Yip, APOL or Mr. Ch'ien. Petitioner is thus asking this Court to review whether § 13(d) permits a private right of action for failure to make certain disclosures on a Schedule 13D in the circumstances of this case without having before it the party allegedly obliged to make such disclosure. Even if this were an issue warranting this Court's review, this Court should await a case where the party subject to the disclosure obligation is present to explore fully the reasons why the choice was made not to file a Schedule 13D.

Further, this case arises in a poor factual context for this Court to review the limits of the disclosure obligations under § 13(d). Petitioner is trying to transform the Williams Act, which the text and the legislative history indicate is an

investor protection statute, into a vehicle for regulating corporate governance. Mr. Yip and Mr. Ch'ien were both members of the Board of Directors before the challenged conduct at issue took place. They remained so after the challenged conduct at issue. None of the text, legislative history, or caselaw under the Williams Act indicate that it is concerned with how those already exercising influence and control over a corporation choose to exercise such influence or control. Indeed, Petitioner is not seeking to vindicate any rights he has as an investor. He sued to regain his seat on the board of directors. Even if the question presented were worthy of this Court's review, which it is not, this Court should consider the question in the context of a defendant who changed his status from a passive investor into one who asserted control or influence over the corporation.[3] This is not such a case.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

1. The decision below created no conflict at all. The decision below creates no split of authority between the Seventh Circuit and any other Court of Appeals. No other Court of Appeals decision even confronts the precise question presented here: whether a cause of action under § 13(d) may arise outside the context of a tender offer or aggregation of shares for the purpose of acquiring control of the issuer. All of the cases relied upon by Petitioner as supposedly in conflict with the Seventh Circuit's decision here in fact involved explicit allegations of either a tender offer or the acquisition of stock for the purpose of acquiring control of the issuer.

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[3] The Securities And Exchange Commission has espoused the view that nominating and electing directors "should not be deemed as having a purpose or effect of changing or influencing control of the company." Security Holder Director Nominations, 68 Fed. Reg. 60784, 60805 (Oct. 23, 2003).

In *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), the Second Circuit considered whether an alleged conspiracy among four shareholders to pool their combined holdings of 10.25% of the outstanding stock of GAF Corp. to effect a takeover of that company should fall within the reach of § 13(d). The Second Circuit held that the formation of the shareholder group resulted in an acquisition by the group of the shares that had been owned individually by its members before the group was formed. Thus, the group had acquired 10.25% of the outstanding stock of GAF Corp. for the purpose of effecting a takeover of GAF Corp., bringing the acquisition of shares by the group within the ambit of §13(d).

The petition implies that the Second Circuit, in *GAF Corp.*, recognized a cause of action under § 13(d) in the absence of a control purpose because "[t]here was no indication of any ongoing effort to seize control" of GAF Corp. Pet. 14. However, the Second Circuit explicitly recognized that "[t]he complaint here alleges that past violations of section 13(d) are continuing and that the conspiracy to take over GAF 'continues unabated.'" *GAF Corp.*, 453 F.2d at 714 n.11.

In *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992), the Ninth Circuit addressed allegations that Pennzoil had filed a materially misleading Schedule 13D regarding its ownership of stock in Chevron. Chevron explicitly alleged that Pennzoil's Schedule 13D was misleading because it failed to disclose an intent to attain a control position. The district court granted Pennzoil's motion for summary judgment on the ground that affidavits of Pennzoil's directors established that at the time of the Schedule 13D filing, Pennzoil did not intend to exert control over Chevron management. It further ruled that "evidence submitted by Chevron concerning discussions by Pennzoil officials of the possibility of exercising control over Chevron . . . were insufficient to create a genuine issue of material fact as to the good faith of Pennzoil's disclosure." *Id.* at 1157. The Ninth Circuit reversed, concluding that the evidence submitted by

Chevron did allow for a reasonable inference to be drawn that Pennzoil's Schedule 13D was misleading because it failed to disclose Pennzoil's intent to attain a control position. *Id.* at 1161.

Dan River, Inc. v. Unitex, Ltd., 624 F.2d 1216, 1221 (4th Cir. 1980) involved Dan River's appeal from the dismissal of its complaint alleging that a Schedule 13D filed by Unitex failed to disclose that one of the purposes of Unitex's acquisition of Dan River stock was "to seek a position of sufficient control or influence in Dan River to enable . . . defendants to obtain on unduly favorable terms textiles made by Dan River." Far from allowing a § 13(d) action in the absence of an acquisition of stock for the purpose of controlling the issuer, the Fourth Circuit noted that an issue that the district court should have addressed, but did not address, was whether Unitex's Schedule 13D was misleading for the specific failure to disclose a control purpose related to its acquisition of Dan River stock. That issue presented questions of fact regarding the purpose of Unitex's acquisition of Dan River stock that were not properly resolved on a motion to dismiss. Though Unitex declared in its Schedule 13D that the purpose of its acquisition of Dan River stock was to make an "equity investment," it also disclaimed making the purchases as a "passive investor." The Fourth Circuit recognized that "[i]mplicit in this disclaimer is the idea that there was some purpose beyond mere investment for investment sake. . . . [T]he defendants are looking to the purchase of approximately twenty percent of the outstanding equity stock in Dan River. Such an accumulation of stock in a publicly held corporation frequently is regarded as control of a corporation." *Id.* at 1225. The Fourth Circuit remanded to the district court for further inquiry "into the defendants' purpose in purchasing large amounts of Dan River stock." *Id.* at 1226.

The remaining cases from the Courts of Appeals that supposedly are in conflict with the decision below are merely

cited without discussion. Pet. 11-12. A review of them indicates that they no more support Petitioner's erroneous claim of a conflict than does *GAF Corp., Chevron, Inc.* or *Dan River, Inc.*. Each of those decisions addresses factual settings involving either a tender offer or an acquisition of stock for the purpose of acquiring control of the issuer. *See General Aircraft Corp. v. Lampert*, 556 F.2d 90, 95-96 (1st Cir. 1977) (concluding that the district court "did not err in finding . . . that appellants' Schedule 13D was inaccurate and misleading in stating that the purchase of shares was for the purpose of investment rather than acquisition of control"); *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 713 (5th Cir. 1984) ("On the basis of ample evidence, the trial court found that . . . Smith concealed its intent to acquire control of Gearhart by filing a 13(d) disclosure statement and amendments to it that failed to reflect that intent, stating rather that it wished to acquire the Gearhart stock for 'investment.'"); *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 246 (8th Cir. 1979) ("There is ample support in the record for the finding of a control purpose. . . . The district court further found that Sun has prepared an 'acquisition model' with Chromalloy as a 'target.'"); and *Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513 (11th Cir. 1985) (concluding that an issuer has a private right of action under §13(d) to obtain corrective disclosure from a tender offeror).

Finally, Petitioner claims that the Seventh Circuit has created an intra-circuit split with its prior decision in *Indiana Nat'l Corp. v. Rich*, 712, F.2d 1180 (7th Cir. 1983). Pet. 13-14. This Court, of course, does not typically review cases involving mere intra-circuit splits of authority. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting Court's previous denial of certiorari when case was first subject to a petition for certiorari and only an intra-circuit split existed). In any event, Petitioner is, once again, wrong. In *Indiana Nat'l*, the Seventh Circuit recognized that there is an implied

private right of action for an issuer corporation to seek injunctive relief on behalf of its shareholders under § 13(d). Petitioner mischaracterizes *Rich* as a case in which the Seventh Circuit "effectively sustained the legal sufficiency of plaintiff's § 13(d) claim *notwithstanding the absence of allegations regarding a tender offer or a control contest.*" Pet. 14 (emphasis added). To the contrary, on the first page of the opinion in *Rich*, the Seventh Circuit noted that the complaint alleged that "defendants' Schedule 13D contained materially false and misleading information, in that it failed to disclose the defendants' intention to acquire control of Indiana National." *Rich*, 712 F.2d at 1181. Indiana National filed the complaint because it believed it was facing an imminent battle for control that had not been properly previewed in a Schedule 13D filing. That the Seventh Circuit recognized that it was dealing with a situation involving an imminent contest for control is clear in its characterization of the manner in which Congress intended § 13(d) to protect shareholders: "by generating a 'fair fight' between the incumbent management and the persons believed to be seeking to acquire control, in order that the shareholders may make an intelligent decision between them when called upon to do so." *Id.* at 1185.

The Seventh Circuit's decision here created no split of authority. It merely prevented petitioner from expanding the private right of action under § 13(d) farther than any other court has ever had occasion to apply it before: outside the context of a tender offer or other accumulation of stock for the purpose of obtaining control of the issuer. This Court, as noted above, has clearly indicated that the Williams Act's "sole purpose" is "the protection of investors who are confronted with a tender offer." *Piper*, 430 U.S. at 35. All the cases in the Courts of Appeals have recognized a private right of action under § 13(d) in that context. None of them have recognized a private right of action beyond that context.

There is thus no conflict among the Courts of Appeals requiring this Court's review.

2. The decision below is the first occasion any Court of Appeals has had to address the question presented and this Court's review now would be premature. This Court does not typically rush to review a question of federal statutory law that has not had the benefit of consideration from a variety of the Courts of Appeals. And this case presents no circumstances warranting an exception to that generally prudent practice.

Contrary to petitioner's suggestion, the decision below does not conflict with any decisions of this Court. Pet. 23-24. Respondent does not dispute the general proposition that "when Congress amends a statute which has been judicially construed as providing an implied private right of action, Congress intends to approve and ratify the private right of action so implied." *Id.* at 23 (citing cases). But the Seventh Circuit has not held that there is no private right of action under § 13(d). The Seventh Circuit has merely concluded that such a right of action is limited to those circumstances involving a tender offer or other accumulation of stock for the purpose of obtaining control over the issuer. In so holding, the Seventh Circuit properly relied upon decisions from this Court stating that the Williams Act is designed to provide investors with information so they can best determine how to respond to a corporate takeover effort. *Piper*, 430 U.S. at 35; *Rondeau*, 422 U.S. at 58 ("The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."). Far from standing in conflict with this Court's prior decisions, the decision below stated a rule that flows from this Court's own statements of the specific purpose of the Williams Act.

Petitioner further claims that the Seventh Circuit's rule will prove "unworkable" in practice because it is "vague,

ambiguous and incomprehensible." Pet. 24. Such a claim is premature and overblown.

The claim is overblown because the absence of litigated cases involving assertions of private rights of action outside the context of a tender offer or other accumulation of stock for the puropose of obtaining control of the issuer suggests that members of the investing public do not see the circumstances of this case as presenting a substantial problem in securities law or regulation. If the investing public were concerned about the absence of private rights of action under § 13(d) in the kind of situation alleged here — a current member of the board of directors exercising his judgment to vote his shares against an incumbent member of the board — this would not have been the first case to reach the Court of Appeals presenting the issue. Further, petitioner himself suggests that the Seventh Circuit's rule is perfectly comprehensible when he claims that "[a]lmost every case involving an alleged § 13(d) violation" could meet the Seventh Circuit's standard. Pet. 24-25.[4] If the Seventh Circuit has adopted a standard broad enough to capture all allegations of violations of § 13(d), there is nothing for this Court to clarify.

In any event, petitioner's claim of unworkability is premature. As noted above, this the first case in which the question presented has been considered by a Court of Appeals. There is no need for this Court to act quickly to clarify any ambiguity in the Seventh Circuit's standard (even if one existed) before either the Seventh Circuit or other Courts of Appeals have had the opportunity to further refine

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[4] Petitioner subsequently argues that the Seventh Circuit erroneously failed to recognize that his claim does meet its supposedly newly minted standard. Pet. 25-27. Such a claim of the mere erroneous application of a legal standard to the facts alleged in a complaint does not warrant this Court's review. Sup. Ct. R. 10 (stating that a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

and clarify the rule themselves as new circumstances arise. The reasons to wait for further development in the courts below is particularly strong here given the apparent lack of any concern among members of the investing public demonstrated by the apparent absence of other investors asserting claims like Petitioner's.

II. THIS CASE PRESENTS A POOR VEHICLE FOR THIS COURT'S REVIEW OF THE QUESTION PRESENTED.

Even if the question presented were one involving a split of authority that was sufficiently developed in the lower courts to warrant this Court's review (which it is not), this case would present a poor vehicle for such review. Petitioner was never able to obtain personal jurisdiction over the only parties he claims are subject to the disclosure obligations of § 13(d). Thus, the only respondent before this Court was not itself subject to the disclosure obligations of § 13(d). Further, given the nature of the relief petitioner seeks, this case presents the question of the scope of § 13(d) in a context wholly divorced from its purpose of protecting investors.

1. CDC is not and is not alleged to be subject to the disclosure requirements of § 13(d). Petitioner does not and cannot claim that CDC was required to make any disclosure under § 13(d). Issuers of securities are specifically exempt from § 13(d)'s disclosure obligations. 15 U.S.C. § 78m(d)(6)(C). In any event, SEC Rule 13d-1(e)(2) provides that a person who has acquired or holds more than 5% of an issuer's securities "with a purpose or effect of changing or influencing control of the issuer" may not "[v]ote or direct the voting of the securities" without filing a Schedule 13D ten days in advance. CDC was not alleged to hold more than 5% of its own stock with a purpose or effect of changing or influencing control of CDC. CDC is not alleged to have voted its securities improperly without having filed a Schedule 13D. CDC is not alleged to have been required to file a Schedule 13D at any time.

Instead, petitioner claims that Mr. Yip, on behalf of APOL, was required to disclose, through a form Schedule 13D, his intention to direct that APOL's shares be voted against petitioner in the board election, and further that Mr. Ch'ien was likewise going to vote his shares against petitioner as well. But none of Mr. Yip, APOL or Mr. Ch'ien have ever been brought within the jurisdiction of the court.

This Court should not review the question of whether Mr. Yip should have made any disclosure (on behalf of APOL) without either Mr. Yip or APOL present before the Court. To review the question without those parties present before the court would result in what is essentially an advisory opinion. Petitioner is not entitled to any relief requested unless he can establish that *someone* violated § 13(d). Petitioner simply cannot establish his right to a judgment against CDC based even on his own view of the scope of § 13(d), and CDC is the only party subject to the jurisdiction of the court. The only persons who could even conceivably have violated § 13(d) are not before the court.[5] Therefore, this Court's review of the Seventh Circuit's standard could not result in any ultimate change in the outcome of the case.[6] Even if this Court

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[5] Respondent argued before the Seventh Circuit that CDC could not, as a matter of law, have violated § 13(d). Petitioner argued that the court could find that CDC violated § 13(d) by virtue of its decision to count the shares voted by Mr. Yip and Mr. Ch'ien. Petitioner's novel theory was supported by neither caselaw, statutory text, the text of any SEC Rule, or the policies behind the Williams Act. However, the Seventh Circuit never reached this potentially alternative ground for affirming.

[6] For the same reason, calling for the views of the Solicitor General is unnecessary here. While petitioner claims that the Seventh Circuit improperly failed to defer to the views of the SEC, Pet. 15-16, even petitioner recognizes that the SEC asserted only that Mr. Yip should have filed a Schedule 13D. Nowhere does the SEC claim that CDC should have filed a Schedule 13D or otherwise failed to abide the dictates of § 13(d). Indeed, the SEC explicitly recognized that CDC did not violate § 13(d). In any event, the courts need not defer to an agency's litigating position with respect to a statute, which is all that occurred here. *Bowen v.*

concludes that the question presented warrants review, then, this Court should await a case where the outcome turns on the disputed scope of § 13(d).

2. This case involves a factual setting removed from the investor protection purpose of the Williams Act. As discussed above, and as noted by the Seventh Circuit in the decision below,

> [w]ithout fail, the courts that have examined the legislative history have arrived at the same conclusion: In enacting § [13(d)], Congress sought to empower the common investor with adequate information regarding those seeking control of an issuer through a tender offer or other method of acquisition so that an individual investor is able to decide whether to retain or dispose of his stock.

Edelson, 405 F.3d at 633. This Court has twice indicated that the Williams Act exists for the purpose of protecting investors faced with making investment decisions in the context of an effort by an outsider to obtain control of the issuer. *Piper*, 430 U.S. at 28; *Rondeau*, 422 U.S. at 58. The Williams Act provides investors with critical information in connection with an important investment decision at the moment when an outsider and incumbent management are battling for control of the issuer. *Piper*, 430 U.S. at 29.

Petitioner, though an investor in CDC, has not filed a complaint that seeks to vindicate the purpose of the Williams Act. The remedy petitioner seeks is unconnected to any investment decision he had to make, and the facts he alleges do not involve a contest for control of CDC between an outsider and incumbent management. Petitioner is complaining that Mr. Yip exercised his right to vote against him in an election for a seat on the board. Mr. Yip was not an

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Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.")

outsider engaged in a contest with incumbent management. Mr. Yip was a member of the board himself who, in that capacity, was known to all investors as someone exercising influence over CDC. Even counting a decision to vote for or against a candidate for the board of directors as an "investment decision" (and nothing indicates that such a decision should count as an investment decision under the Williams Act) Petitioner nowhere alleges that he lacked crucial information in connection with any investment decision *he* had to make. Petitioner was going to vote in favor of his election whether Mr. Yip indicated he would vote against him or not. What Petitioner seeks is an opportunity to more effectively campaign for his election to the board.

It is thus petitioner who is contorting the Williams Act. He is divorcing it from anything having to do with the purchase or sale of securities and attempting to transform it into a statute that regulates the manner of corporate elections for seats on the board of directors. Petitioner can cite no authority for the proposition that the Williams Act exists to regulate issues connected with corporate governance, such as a decision by one incumbent member of the board to vote his shares against the retention of another.

In the end, this case, involving a dispute between two parties who were, at the relevant time, both directors of CDC with access to all information relevant to investment decisions, provides a poor opportunity to consider the scope of § 13(d). Even if the statute *could* be read to support a private right of action outside the context of a tender offer or other accumulation of stock for purpose of exercising control, there is no reason to believe it applies in connection with a current board member's decision to vote his shares as he pleases in connection with a board election.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 05-399

IN THE

Supreme Court of the United States

HARRY EDELSON,

Petitioner,

v.

CDC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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Petitioner Harry Edelson ("Edelson") hereby submits his Reply Brief in Support of his Petition for Writ of Certiorari.

I. CONTRARY TO CDC'S POSITION, THE SEVENTH CIRCUIT DECISION CREATED A CIRCUIT SPLIT.

In its Brief in Opposition ("Op.Br."), respondent CDC Corporation ("CDC") disputes that the Seventh Circuit's decision in this case (*Edelson v. Ch'ien*, 405 F.3d 620 (7th Cir. 2005)) creates a Circuit split regarding the scope of the implied private right of action under §13(d) of the Securities Exchange Act of 1934 ("1934 Act"; 15 U.S.C. §78m(d)). CDC contends that the fact patterns in some of the cases cited by Edelson can be reconciled with the Seventh Circuit's *Edelson* decision. However, the salient point remains that no other Circuit has *limited* or *restricted* the §13(d) right of action to circumstances involving "a tender offer or other contest for control", as did the Seventh Circuit in this case (405 F.3d at 634).

Instead, the decisions cited by Edelson hold generally that stockholders and issuers (as the *de facto* representatives of stockholders) can sue under §13(d), without restriction or qualification. Tellingly, CDC cites no case (other than the decision below) in which a §13(d) claim was dismissed because no "tender offer or other contest for control" had yet ensued.

Seeking to fill this void, CDC observes that many of the cases cited by Edelson involved allegations that a §13(d) filer had misrepresented or failed to disclose its *intent* to change control. CDC notes that in *Chevron Corp. v. Pennzoil Corp.* 974 F.2d 1156 (9th Cir. 1992), plaintiff alleged a Schedule 13D filing "was misleading because it failed to disclose an intent to obtain a control position". Similarly, CDC describes *Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d

1216, 1221 (4th Cir. 1980) as involving an alleged failure "to disclose a control purpose". Op.Br. at 9-10.

However, the Seventh Circuit's decision requires far more than an allegation that stock was acquired or accumulated with the *intent* or *purpose* of obtaining control. Instead, the Seventh Circuit flatly held that no §13(d) action will lie absent a tender offer or a "control contest", which Seventh Circuit described as a situation in which an individual investor is forced to "decide whether to retain or dispose of his stock". 405 F.3d at 633. That Court also plainly stated that, "[T]here does not appear to be any indication in the language of §13(d) that Congress intended a remedy for individual investors who were not faced with the choice of retaining or disposing of their stock in the face of an *imminent* change in control." *Id.*, quoted by CDC at Op.Br., p. 6.

This language reveals beyond doubt that the Seventh Circuit was breaking new ground. There was no "tender offer or contest for control" underway in either *Chevron* or *Dan River*. In neither case were the issuer's stockholders faced with an imminent decision regarding whether to hold or sell their stock. Thus, under the Seventh Circuit's test, the §13(d) claims in those cases would not be actionable.[1]

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[1] The same considerations apply to *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971). In the Petition, Edelson noted that in *GAF*, a proxy contest had already occurred, and there was no indication of an ongoing effort by defendants to obtain control of the plaintiff-issuer. CDC responds that the Second Circuit recognized that the complaint in *GAF* alleged that the conspiracy to take control

Indeed, if the Seventh Circuit's decision required only that a §13(d) plaintiff allege that stock was acquired with a purpose or intent to change control, then Edelson's §13(d) claim would have been upheld. As Edelson alleged, defendant Peter Yip Hak Yung ("Yip") made Schedule 13G filings reflecting his acquisition (in the name of defendant Asia Pacific Online Ltd. ("APOL")) of an *additional* 4.3 million CDC shares in January 2003. Yip's beneficial ownership percentage increased by 4.25%, from 14.36% to 18.61%. Cmpl. ¶¶15-16 and Exs. A and B thereto. As Edelson explained in the Petition (at 25-26), the *additional* 4.3 million shares acquired by Yip were the swing votes that resulted in the removal of Edelson and J. Carter Beese ("Beese") from the CDC Board.

Clearly, Yip had an "intent" and "purpose" to change control over CDC. In fact, control changed. CDC's only two American directors, who were two-thirds of the audit committee, were ousted. Two of seven directors – the two most outspoken critics of management – were replaced by Yip's and Ch'ien's hand-picked lackeys. Yip and Ch'ien thereby converted the Board of CDC, a public company traded on NASDAQ, into their personal Hong Kong cabal and fiefdom.

The Seventh Circuit nevertheless rejected Edelson's §13(d) claim even though he plainly alleged: (1) an "acquisition or accumulation of stock" (here, Yip's acquisition of an *additional* 4.3 million shares)[2]; and (2) an intent or purpose to change control (Yip's and Ch'ien's intent to oust Edelson and Beese from the Board). Clearly then, in the Seventh Circuit, it is

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"continues unabated'" (Op.Br. 9, quoting 453 F.2d at 714, n. 11. Nevertheless, nothing in *GAF* reflects that the issuer's stockholders had to decide whether to hold or retain their shares, in view of the completion of the prior proxy contest.

[2] At the same time, Ch'ien acquired 200,000 additional CDC shares.

no longer sufficient to allege only that a §13(d) filer acquired or accumulated stock without disclosure of an existing control purpose or intent; a claim can be stated only if the §13(d) plaintiff also alleges that stockholders are confronted with the imminent need for stockholders to decide whether to hold or to sell. Thus, allegations of the type that CDC stresses were made in *Chevron* and *Dan River* are no longer sufficient in the Seventh Circuit, and the Seventh Circuit decision clearly creates a split among the Circuits.

Indeed, the Seventh Circuit departed from its own past precedent (which was consistent with the prevailing law in the other Circuits). CDC characterizes as erroneous Edelson's statement that *Indiana National Corp.* v. *Rich*, 712 F.2d 1180 (7th Cir. 1983) sustained a §13(d) claim in "the absence of allegations regarding a tender offer or control contest". Op.Br. at 12, quoting Petition at 14. According to CDC, the *Indiana National* Court referred to plaintiff's allegation that defendants had failed to disclose their intention to acquire control. However, in *Indiana National* (as in *Chevron* and *Dan River*), there were no circumstances creating an imminent need for the issuer's shareholders to decide whether to hold or sell. By departing from past precedent, by imposing the previously unknown requirement that a §13(d) claim lies only in situations involving a tender offer or control contest, the Seventh Circuit has created a split among the Circuits.

II. EDELSON'S ACTION IS A PROPER VEHICLE FOR REVIEW OF THE ISSUE PRESENTED.

CDC also characterizes this case is a "poor vehicle" for this Court to address the new limitations created by the Seventh Circuit's decision (Op.Br. at 7). CDC argues that, "The only respondent before this Court, CDC, is not even alleged to have had any disclosure obligations under §13(d)."

However, CDC filed the Motion to Dismiss that was granted by the District Court, and CDC argued in the Seventh Circuit for affirmance of that dismissal. CDC has now appeared before this Court as well. If CDC was merely a nominal party to this case (as it now seeks to characterizes itself), CDC would not have litigated this case as vigorously as it has. CDC's Opposition Brief acknowledges that its motion to dismiss Edelson's §13(d) claim was not confined its own lack of §13(d) disclosure obligations (Op.Br. at 5). Instead, CDC also vigorously argued that Edelson lacked standing to sue and that the §13(d) right of action was confined solely to cases involving tender offers.

Obviously, throughout this case, CDC has been acting as the "front" for its principal managers, Yip and Ch'ien. Since CDC has raised, briefed and argued the issues relevant to this Court's review of the Seventh Circuit's decision, it is disingenuous for CDC to suggest that review should be denied merely because CDC is presently the only respondent.

Moreover, CDC has liability for the §13(d) violations that occurred. As CDC acknowledges (Op.Br. at 16), Edelson alleges that CDC is itself liable under §13(d) and Securities and Exchange Commission ("SEC") rules thereunder. SEC Rule 13d-1(e) disqualified Yip's APOL shares from being voted at CDC's 2003 Annual General Meeting. CDC nevertheless counted those ineligible votes, and removed Edelson and Beese from the CDC Board based on its acceptance of those ineligible votes. This case therefore presents a situation in which, as the SEC recognized in its *amicus* brief, an issuer "may be a necessary party [to a §13(d) case] in order to effectuate full and proper relief" (p. 19, n. 10).

CDC's statement that Edelson purportedly "*was never able to establish the district court's personal jurisdiction over Mr. Yip, APOL or Mr. Ch'ien*" (Op.Br. at 7) is deceptive, offensive and reprehensible. Personal jurisdiction was not obtained over those Hong Kong

defendants because they successfully ducked service of process until after the District Court's dismissal of Edelson's §13(d) claim.[3]

If Yip, APOL and Ch'ien had not evaded service, the District Court could unquestionably have exercised personal jurisdiction over them with respect to the §13(d) claim. Section 27 of the 1934 Act (15 U.S.C. §78aa) authorizes service of process "wherever the defendant may be found...". When a federal statute authorizes worldwide service, personal jurisdiction comports with due process if defendant has minimum contacts with the United States. *Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035-36 (7th Cir. 2000); *Fitzsimmons v. Barton*, 589 F.2d 330, 332-34 (7th Cir. 1979); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002). As officers of a company whose stock trades on NASDAQ, has offices in several U.S. cities, and has acquired several subsidiaries based in the U.S., Yip and Ch'ien indisputably had sufficient contacts with the United States to warrant the exercise of personal jurisdiction over them for federal statute issues. It is offensive for CDC even to suggest that this Court should deny certiorari because its top officers evaded service.

CDC argues that in the absence of the other defendants, "this Court's review ... could not result in any ultimate change in the outcome of this case." Op.Br. at 16. However, this Court's review could result in reinstatement of Edelson's §13(d) claim. If the dismissal is reversed, Yip APOL and Ch'ien would (as explained above) be subject to personal jurisdiction

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[3] At the outset of the case, Edelson requested defendants, pursuant to Rule 4(d), *Fed.R.Civ.P.*, to waive service of process. When defendants failed to do so, Edelson retained a private process server in Hong Kong. Multiple attempts at service were made before the process server was able to effect service, but by that time the §13(d) claim had been dismissed on CDC's motion.

with respect to that claim, and the action would then proceed as to both CDC and the other defendants.

III. EDELSON'S §13(D) CLAIM IS CONSISTENT WITH THE INVESTOR PROTECTION PURPOSES OF THE STATUTE.

CDC also argues that Edelson's claim purportedly does not seek to vindicate the investor protection purposes underlying §13(d). CDC is wrong. Edelson is a CDC stockholder; as the SEC recognized in its *amicus* brief (at 22), he has as much right to seek redress under §13(d) as any other stockholder.

CDC's asserts that the facts here "do not involve a contest for control of CDC between an outsider and incumbent management" (Op.Br. at 17). However, Edelson specifically alleged that he and Beese, CDC's two American *outside* directors, were removed from the Board by Yip and Ch'ien (the incumbent management) due to their questioning and criticism of CDC management – especially after Edelson sent a scathing e-mail asserting that (a) "Corporate governance at chinadotcom ... is falling to pieces"; (b) "The voices of independent directors are ignored or abused"; and (c) the Board was being called upon to "push through spur of the moment initiatives by management." Cmpl., ¶19 and Ex. E.

As the SEC explained, the scheme resulted in Edelson and other CDC shareholders being:

> "[I]llegally kept in the dark about the change in control plans of stockholders who were required to disclose those plans under §13(d). The solidifying of management's control over a company, to the exclusion of dissenting voices, is the kind of event that §13(d)'s disclosure requirement was intended to reveal to shareholders, see *Bath Ind. Inc. v. Blot*, 427 F.2d 97, 109 (7th Cir. 1970), and Schedule 13D expressly requires the disclosure of any

> plan to change the composition of corporate boards. *See* Schedule 13D, Item 4.

SEC *amicus* brief at 22-23. Yip's and Ch'ien's clandestine scheme deprived Edelson and other CDC stockholders of information to which they were entitled. Edelson's claim is therefore perfectly consistent with the investor protection purposes of §13(d).

The SEC's citation of Item 4 of Schedule 13D belies CDC's erroneous claim that Edelson "can cite no authority for the proposition that the Williams Act exists to regulate issues connected with corporate governance" (Op.Br. at 18). Because companies are controlled by their Boards, a possible alteration of a company's Board logically has as much effect on an investor's decision to hold or dispose of his or her stock as does a tender offer (which, after all, is merely a prelude to the offeror's acquisition of the voting power needed to elect directors). By foreclosing a private right of action for an acknowledged violation of §13(d) under these circumstances, the Seventh Circuit's decision does violence to the investment protection purpose of the statute.

CDC mischaracterizes this case as "a dispute between two parties who were, at the relevant time, both directors of CDC with access to all information relevant to investment decisions..." (Op.Br. at 18). Neither Edelson nor CDC's other stockholders had "relevant information" concerning the clandestine plot by Yip and Ch'ien to alter the composition of CDC's Board, because Yip misrepresented, on multiple Schedule 13G filings, that he had no plans to change control of CDC (indeed, CDC's own proxy statement, promulgated just weeks before the disputed 2003 Annual Meeting and prepared under the supervision of Yip and Ch'ien, *recommended* the re-election of Messers. Edelson and Beese to the Board).

CDC posits that review of the Seventh Circuit is unwarranted because "If the investing public were concerned about the absence of private rights of action under §13(d) in the kind of situation alleged here – a current member of the board of directors exercising his judgment to vote his shares against an incumbent member of the board – this would not have been the first case to reach the Court of Appeals presenting the issue." Op.Br. at 14. This argument would make sense only if CDC could show that similar situations have occurred in the past. However, CDC makes no attempt to do so. As such, CDC's assertions that regarding the ostensible "concerns" of the "investing public" rest on nothing other than rank speculation.[4]

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[4] The SEC's *amicus brief*, the SEC questioned the ability of Yip, as CDC's CEO, to report his ownership on Schedule 13G rather than Schedule 13D, because a CEO necessarily holds his or her shares "*with the effect* ... of "changing or *influencing the control* of the issuer of the securities...". SEC *amicus* brief at 31, n. 18, emphasis in the original.

Conclusion

The Seventh Circuit's decision is a significant departure from the law in the other Circuits. That decision both curtails stockholders' rights under §13(d) and perpetrates a grave injustice on Edelson. It should be reviewed and reversed.

Respectfully submitted,

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